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Edward P. Barrett

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A TREATISE
ON
CRIMINAL PROCEDURE

BY
FRANCIS WHARTON, LL.D.,
AUTHOR OF TREATISE ON "CRIMINAL LAW," "EVIDENCE," "CONFLICT OF
LAWS," "MEDICAL JURISPRUDENCE," ETC., ETC.

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INDEPENDENT PRESSROOM

CONSPECTUS

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I. COUNSEL FOR THE PROSECUTION.

§ 1488. INTRODUCTORY. The position of the prosecuting attorney, in reference to the inception and direction of prosecutions, has been already noticed.¹ It has been seen that his sanction is essential, either expressly or by implication, to the inception of all prosecutions.

His power as to a nolle prosequi has also been previously discussed.²

§ 1489. PROSECUTING OFFICERS MAY EMPLOY ASSOCIATES. The right of the prosecuting officer to avail himself of the assistance of associates can not, under ordinary circumstances, be questioned. To impose such a restriction would be an absurdity, since there are few cases in which counsel, with practice as large as that of most prosecuting attorneys, are not compelled to avail themselves, at least in the preparation of briefs, of extrinsic professional aid. We have, in addition, to observe that most prosecutions represent complex interests, to each of which may be properly awarded a distinct representative, provided always that such representative acts in subordination to the constituted officer of the law. According to the prevalent American practice, the prosecuting attorney for a county is appointed by the county; but there are many cases in which the attorney general of the state may properly apply for permission to attend, to watch the interests of the state; and others in which a like privilege may be claimed by the legal representative of the United States. It is hard also to see how, where there is a distinct prosecutor, with his own particular injuries

¹ See, *supra*, §§ 1281, 1282.

² *Supra*, §§ 1310 et seq.

to redress or future protection to secure, the prosecuting attorney can refuse to permit such prosecutor to be represented by counsel at the trial, however strictly it may be necessary to lay down the rules by which such counsel are to be governed. Of course, this is not of right, but by the courtesy of the prosecuting attorney; yet cases can well be imagined in which a prosecuting attorney might incur heavy responsibility by rejecting such aid. In the practice of the courts, however, this aid is rarely declined, though the prosecuting attorney always, as a public officer, reserves to himself the direction of the case. And this practice has been repeatedly sanctioned by the courts.¹

¹ CAL.—*People v. Blackwell*, 27 Cal. 65; *People v. Strong*, 46 Cal. 302; *People v. Murphy*, 47 Cal. 103; *People v. Turcott*, 65 Cal. 126, 3 Pac. 461. COLO.—*Raymond v. People*, 2 Colo. App. 239, 30 Pac. 504; *Hinsdale County v. Crump*, 18 Colo. App. 59, 70 Pac. 159. FLA.—*Thalheim v. State*, 38 Fla. 169, 20 So. 938. GA.—*Griffin v. State*, 15 Ga. 476; *Williams v. State*, 69 Ga. 11. IDA.—*People v. Biles*, 2 Ida. 114, 6 Pac. 120; *State v. Steers*, 12 Ida. 174, 85 Pac. 104. ILL.—*Hayner v. People*, 213 Ill. 142, 72 N. E. 729. IND.—*Ward v. State*, 92 Ind. 269; *Selbert v. State*, 95 Ind. 471; *Tull v. State*, 99 Ind. 238; *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 211, 4 N. E. 870. IOWA.—*State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148, 3 Am. Cr. Rep. 1; *State v. Montgomery*, 65 Iowa 483, 22 N. W. 639; *State v. Shreves*, 81 Iowa 615, 47 N. W. 899; *State v. Crafton*, 89 Iowa 109, 56 N. W. 257; *State v. Tyler*, 122 Iowa 125, 97 N. W. 983; *State v. Cogley*, 128 Iowa 114, 103 N. W. 99. KAN.—*State v. Wells*, 54 Kan. 161, 37 Crim. Proc.—123

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27 L. R. A. 686, 62 N. W. 631. OHIO—*Martin v. State*, 16 Ohio 364; *Price v. State*, 35 Ohio St. 601. OKLA.—*Reed v. State*, 2 Okla. Cr. 589, 103 Pac. 1042. PA.—*Rush v. Cavanaugh*, 2 Pa. St. 187; *Com. v. Eisenhower*, 181 Pa. St. 470, 59 Am. St. Rep. 670, 37 Atl. 521. TENN.—*Ex parte Gellespie*, 11 Tenn. (3 Yerg.) 325; *Jarnagin v. State*, 18 Tenn. (10 Yerg.) 529; *Chambers v. State*, 22 Tenn. (3 Humph.) 237. TEX.—*Burkhead v. State*, 18 Tex. App. 599; *McInturf v. State*, 20 Tex. App. 336. VA.—*Hopper v. Com.*, 47 Va. (6 Gratt.) 684; *Jackson v. Com.*, 96 Va. 107, 30 S. E. 452; *McClure v. Com.*, 103 Va. 370, 49 S. E. 623. WASH.—*State v. Hoshor*, 26 Wash. 643, 67 Pac. 386. WIS.—*Lawrence v. State*, 50 Wis. 507, 7 N. W. 343; *Rounds v. State*, 57 Wis. 45, 14 N. W. 865. FED.—*United States v. Hanway*, 2 Wall. Jr. 139, Fed. Cas. No. 15299; *United States v. Rosenthal*, 121 Fed. 862.

In *Com. v. Scott*, 123 Mass. 122, the Massachusetts practice was stated to be, "that while, as a general rule, the district attorney, or other prosecuting officer, should conduct the trial of criminal cases, yet it is within the power of the court in particular cases, in which from peculiar circumstances the interests of public justice seem to require it, to appoint a counsellor of the court to assist the public officer in the trial." See *Com. v. Knapp*, 27 Mass. (10 Pick.) 477, 20 Am. Dec. 534; *Com. v. Williams*, 56 Mass. (2 Cush.) 582; *Com. v. Gibbs*, 70 Mass. (4 Gray) 146; *Com. v. King*, 74 Mass. (8 Gray) 501.

In *People v. Stokes* (N. Y. Sup. Ct. 1872), the appearance of "private" counsel assisting the district

attorney was sustained by Judge Ingraham. Even a statute forbidding county attorneys from receiving fees from prosecutors does not preclude such an attorney receiving as professional assistants counsel paid by the prosecution. See *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257.

In Maine, the practice is for the court, on application, to appoint any counsellor of the court it may deem suitable and proper, to assist the attorney for the state; and the fact that such counsellor may expect compensation from private persons for services thus rendered will not deprive the court of the power to appoint him.—*State v. Bartlett*, 55 Me. 200.

In Michigan private counsel are not admissible on behalf of the prosecution when acting in the interest of a client.—*People v. Hurst*, 41 Mich. 328, 1 N. W. 1027.

—Evidence to show prosecuting counsel to be specially retained, may be offered.—*Sneed v. People*, 38 Mich. 248.

—Such person may be precluded from acting as counsel.—*Merster v. People*, 31 Mich. 99; see *People v. Hendryx*, 58 Mich. 319, 25 N. W. 299.

In Pennsylvania, under the Act of March 12, 1868, private counsel may be employed as substitutes for the prosecuting attorney, if the latter fails in his duty. As assistants to the prosecuting attorney, private counsel are constantly employed.

In Texas it is held that the court may appoint any competent person to assist or represent the prosecuting attorney, during the latter's temporary disability.—*State v. Gonzales*, 26 Tex. 197.

§ 1490. PROSECUTING ATTORNEY OCCUPIES SEMI-JUDICIAL POST. A prosecuting attorney is a sworn officer of the government, required not merely to execute justice, but to preserve intact all the great sanctions of public law and liberty. No matter how guilty a defendant may in his opinion be, he is bound to see that no conviction shall take place except in strict conformity to law.¹ It is the duty,

Court applied to for sanction to employ assistance, in some jurisdictions. See *Shular v. State*, 105 Ind. 289, 290, 55 Am. Rep. 211, 4 N. E. 870; see *State v. Griffin*, 87 Mo. 668; *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361.

Court may appoint assistant to prosecuting attorney.—*State v. Taylor*, 122 Iowa 125, 97 N. W. 983.

Discretion of trial court to allow counsel to aid prosecutor, and this discretion will be interfered with in cases of abuse of discretion, only: CAL.—*People v. Blackwell*, 27 Cal. 65. COLO.—*Raymond v. People*, 2 Colo. App. 239, 30 Pac. 504; *Hinsdale County v. Crump*, 18 Colo. App. 59, 70 Pac. 159. HAWAII—*Territory v. Chong Chak Lai*, 19 Hawaii 438. ILL.—*Hayner v. People*, 213 Ill. 142, 72 N. E. 792. IND.—*Wood v. State*, 92 Ind. 271; *Tull v. State*, 99 Ind. 238; *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 211, 4 N. E. 870. IOWA—*State v. Tyler*, 122 Iowa 129, 97 N. W. 985. ME.—*State v. Bartlett*, 55 Me. 200. MASS.—*Edwards v. State*, 47 Mass. 581. MONT.—*State v. Tighe*, 27 Mont. 333, 71 Pac. 3; *State v. O'Brien*, 35 Mont. 482, 10 Ann. Cas. 1006, 90 Pac. 514. VA.—*Jackson v. Com.*, 96 Va. 107, 30 S. E. 452. WASH.—*State v. Hoshor*, 26 Wash. 643, 67 Pac. 386.

Error of court in appointing attorney to assist prosecutor will not be presumed.—*Price v. State*, 35 Ohio St. 601.

Irregularity in appointment of counsel to assist prosecutor must be shown by accused objecting to such appointment; irregularity will not be presumed.—*State v. Tough*, 12 N. D. 425, 96 N. W. 1025.

Person injured, being an attorney, may assist prosecutor in conducting the prosecution.—*Lawrence v. State*, 50 Wis. 507, 7 N. W. 343.

Post to be assigned to such counsel is for the prosecuting attorney to determine, though the order of precedence is subject to the discretion of the court.—*Jarnagin v. State*, 18 Tenn. (10 Yerg.) 529; *infra*, §§ 1495 et seq.

"Question whether circumstances require such appointment, and whether the person recommended by the public officer is a fit and proper person, are, in a large degree, within the sound discretion of the court below, by which they must, in the first instance, be decided."—*Com. v. Scott*, 123 Mass. 122.

Swearing of assistant to prosecutor to act fairly and impartially, is not necessary.—*State v. Taylor*, 98 Mo. 240, 11 S. W. 570.

¹ See, *infra*, § 1496. IOWA—*State v. Ruby*, 61 Iowa 86, 15

indeed, of all counsel to repudiate all chicanery and all appeal to unworthy prejudice in the discharge of their high office; but eminently is this the case with public officers, elected as representing the people at large, and invested with the power which belongs to official rank, to comparative superiority in experience, and to the very presumption here spoken of, that they are independent officers of state.² Such officers are bound to open carefully all the material facts bearing on the case, and to call all material witnesses of the litigated facts;³ and to scrupulously avoid all unfairness in the presentation of the law.⁴

N. W. 848; *State v. Maynes*, 61 Iowa 119, 15 N. W. 864. MICH.—*Engle v. Chapman*, 51 Mich. 525, 16 N. W. 886; *People v. Quick*, 51 Mich. 547, 18 N. W. 375. MO.—*State v. Pagels*, 92 Mo. 300, 4 S. W. 931; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330. S. C.—*State v. Sanford*, 1 N. & McC. L. 512.

² Talford's review of Twiss' *Eldon*, thus speaks: "In deciding on the charges to be preferred against the parties accused of treason, for their share in the English combination of 1794, he manifested a nobleness of determination beyond the suggestions of expediency, as, in the conduct of the prosecutions, he maintained a courtesy of demeanor which won the respect of his most ardent opponents. He believed the offense to be treason; and although a conviction for that crime was more than doubtful, while a conviction for seditious conspiracy might have been regarded as almost certain, he rejected the safer and baser course, and acted on the severe judgment of his reason.

The analysis of these trials by Mr. Twiss—one of the most masterly and striking passages of his work—while it may leave the prudence of the attorney-general open to question, must satisfy every impartial mind of the elevation of the motive by which he was impelled. While he dreaded any relaxation of the criminal law—as if all its old 'terrors to evil-doers' would vanish in air if its most awful penalty were removed from crimes against which it had long been threatened—he endured the most anxious labor to prevent its falling on an innocent sufferer, or one who, however guilty, was not subjected to its infliction by the plainest construction of law."—See, also, remarks of Gurney, B., in *R. v. Thursfield*, 8 Car. & P. 269, 34 Eng. C. L. 727.

Duties of prosecuting attorneys are discussed in 1 Steph. Hist. Cr. L., ch. XI, and in an excellent article in 17 Am. Law Rev. 529.

³ *Infra*, §§ 1496, 1497, 1500; *Hurd v. People*, 35 Mich. 405; *State v. Sanford*, 1 N. & McM. (S. C.) 512.

⁴ That unfairness in this respect

§ 1491. PROSECUTION BY COUNSEL EMPLOYED BY PRIVATE PARTIES. At common law, criminal prosecutions were instituted by private individuals, who employed and paid their own counsel for that purpose; and statutes were passed the design of which was to encourage private persons to prosecute and convict criminals.¹ In this country opinion is divided on the right of a person interested in the issue of a criminal prosecution to employ, at his own expense, counsel to assist in the prosecution, some of the cases denying the propriety of such an employment and assistance, against the objection of the accused;² but the weight of authority is to the effect that the accused can not object on the ground of such employment and payment of counsel by a private person,³ even though such assistance is not requested by the prosecuting attorney,⁴ although there is authority to the contrary.⁵

may be ground for a new trial, see, *infra*, §§ 577, 852.

¹ 21 Hen. VIII, ch. 11, provided that on a conviction of accused of larceny, the person prosecuting recovered his goods.

25 Geo. II, ch. 36; 7 Geo. III, ch. 64; 18 Geo. III, ch. 19, all made provisions for paying the expenses of conducting a bona fide criminal prosecution which seemed to the judge trying the cause to be meritorious.

² *Meister v. People*, 31 Mich. 99, 1 Am. Cr. Rep. 91, containing a full discussion of the question and collecting the cases.

³ FLA.—*Thalheim v. State*, 38 Fla. 169, 20 So. 938. IND.—*Keyes v. State*, 122 Ind. 527, 23 N. E. 1097. IOWA—*State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148, 3 Am. Cr. Rep. 1; *State v. Montgomery*, 65 Iowa 483, 22 N. W. 639. KY.—*Bennyfield v. Com.*, 13 Ky. L. Rep. 466, 17 S. W. 271. MASS.—

Com. v. Knapp, 27 Mass. (10 Pick.) 477, 20 Am. Dec. 534; *Com. v. Gibbs*, 70 Mass. (4 Gray) 146. MICH.—*People v. Perriam*, 72 Mich. 184, 40 N. W. 425. MINN.—*State v. Rue*, 72 Minn. 296, 75 N. W. 235. MONT.—*State v. Tighe*, 27 Mont. 327, 71 Pac. 3. N. J.—*Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30. N. D.—*State v. Kent*, 4 N. D. 577, 27 L. R. A. 686, 62 N. W. 621. TENN.—*Hite v. State*, 17 Tenn. (9 Yerg.) 198. UTAH—*People v. Tidwell*, 4 Utah 506, 12 Pac. 61. FED.—*United States v. Morris*, 1 Paine 209, Fed. Cas. No. 15816.

Indictment invalidated by presence of specially employed counsel of district attorney before grand jury.—*United States v. Rosenthal*, 121 Fed. 872.

⁴ *Hopper v. Com.*, 47 Va. (6 Gratt.) 684.

⁵ *Com. v. Williams*, 56 Mass. (2 Cush.) 582.

Thus, it has been said that a private person may employ and pay an attorney to act independently of the prosecuting attorney in suppressing a liquor nuisance.⁶

II. COUNSEL FOR DEFENSE.

§ 1492. DEFENDANTS ENTITLED TO COUNSEL BY THE CONSTITUTION. In England, until recently, the right of defendants in criminal cases to be represented by counsel on trial was denied or abridged. At present in that country, these restrictions are removed. In the United States they never existed. And the right to appear by counsel is guaranteed by the Constitution of the United States, and by the constitutions of most of the states. A prisoner under arrest is entitled to be visited by his counsel at all stages of the procedure.¹

§ 1493. COUNSEL, IF NECESSARY, WILL BE ASSIGNED BY COURT. By the usual practice a defendant has a right to be represented on a trial by any counsel admitted to practice in the court in which the trial is had. There are, however, cases in which the defendant is too poor to employ counsel; and in such cases counsel are assigned him by the court. And as officers of the court, counsel thus assigned can not, if at the time capable of the work, and not otherwise engaged, refuse the trust. It has been said that the court will assign and compel the services of any counsel whom the defendant may suggest. But this view is incompatible with the fact that the obligatory nature of such assignment rests on the power of the court over its officers, a power which the court will not exercise in such a way that any particular officer shall be overburdened by compulsory work. The court, therefore, will not, simply because the defendant requests it, compel any one particular counsel to undertake a duty incompatible

⁶ *Maloney v. Traverse*, 87 Iowa 306, 54 N. W. 155.

¹ *People ex rel. Burgess v. Riley*, 13 Abb. N. C. (N. Y.) 186, 1 N. Y. Cr. R. 492.

with his other engagements. The defendant has a right to some counsel, not to any particular counsel.¹ If he fails to request the appointment of counsel, he can not afterward complain of being unrepresented.²

§ 1494. — SUCH COUNSEL MAY SUE COUNTY FOR THEIR FEES. Can counsel thus assigned sustain an action against the county for their fees? The first impression is in the negative. Counsel are officers of the court, and are obliged as such to render to the court any services that may be necessary to the maintenance of public justice. Counsel, with the emoluments, must take the burdens of their profession. Among the burdens is the gratuitous defense of the poor; and the remuneration for this, in those cases in which no remuneration can be had from the state, must be found, it is urged, in the general income of a profession of which such service is one of the incidents, as well as in the consciousness of duty performed. For these and other reasons it has been held that counsel can not recover from the county compensation for such services.¹ Yet a more careful examination teaches us that this view is not consistent either with English precedent or sound public policy.² Counsel for the defense are as essential to the due examination of the case as are counsel for the prosecution; and to leave the services of the one unremunerated is as impolitic as it would be to leave the services of the other unremunerated. If the state pays to convict its guilty subjects, it should also pay counsel to acquit such as are innocent.

¹ *People v. Molce*, 15 Cal. 329; *Burton v. State*, 75 Ind. 477; see *Com. v. Knapp*, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491; *Pennington v. State*, 13 Tex. App. 44.

² *State v. De Serrant*, 33 La. Ann. 979.

¹ *Rowe v. Yuba*, 17 Cal. 61; *Vise*

v. Hamilton, 19 Ill. 78; *Wayne Co. v. Waller*, 7 W. N. C. (Pa.) 377.

² *Blythe v. State*, 4 Ind. 525; *Hall v. Washington*, 2 G. Greene (Iowa) 473; *Davis v. Linn*, 24 Iowa 508; *Dane v. Smith*, 13 Wis. 585, 80 Am. Dec. 754; *R. v. Fogarty*, 5 Cox C. C. 161.

III. DUTIES OF COUNSEL ON TRIAL.

§ 1495. ORDER AND LENGTH OF SPEECHES AT DISCRETION OF COURT. We may here, departing somewhat from chronological sequence, state at the outset that, so far as concerns the order in which counsel shall speak, the number and duration of their speeches, and the mode in which they shall examine witnesses, the discretion of the court is to rule.¹ Thus, the court is authorized to limit the time of speeches within reasonable bounds,² and to stop an argument to the jury which either controverts the law laid down by the court,³ or introduces facts unproved

¹ ARK.—Dobbins v. Oswald, 20 Ark. 619. IOWA—Hull v. Alexander, 26 Iowa 569. MINN.—State v. Beebe, 17 Minn. 241. MO.—State v. Waltham, 48 Mo. 55. ENG.—R. v. Bernard, 1 F. & F. 240; R. v. Hasell, 2 Cox C. C. 220; R. v. Martin, 3 Cox C. C. 56.

In California, the practice is regulated by statute.—People v. Fair, 43 Cal. 137; People v. Haun, 44 Cal. 96; People v. Ah Wee, 48 Cal. 236.

² KAN.—State v. Riddle, 20 Kan. 711. KY.—Williams v. Com., 82 Ky. 640. MISS.—Lee v. State, 51 Miss. 566. MO.—State v. Linney, 52 Mo. 40; State v. Collins, 81 Mo. 652. NEB.—Hart v. State, 14 Neb. 572, 16 N. W. 905. N. C.—State v. Collins, 70 N. C. 241, 16 Am. Rep. 771. OHIO—Weaver v. State, 24 Ohio St. 584. WIS.—Hoffman v. State, 65 Wis. 46, 26 N. W. 110.

Compare: Hunt v. State, 49 Ga. 255, 15 Am. Rep. 677, where it was held that a limitation to forty minutes, against the protest of counsel, in a complicated homicide case, is ground for reversal.

In State v. Hoyt, 47 Conn. 518,

36 Am. Rep. 89, it was held that a limitation of four hours on a side in a homicide case was not unreasonable.

In White v. People, 90 Ill. 17, it was held that a limitation of five minutes to counsel to address the jury on an indictment for grand larceny, where the evidence is conflicting, is an unreasonable exercise of the discretion of the court, citing Word v. Com., 30 Va. (3 Leigh) 744, citing People v. Keenan, 13 Cal. 581.

See, to same effect, Proffatt on Jury Trials, § 254.

Arbitrary limitation ground for reversal.—People v. Keenan, 13 Cal. 581; Williams v. State, 60 Ga. 367, 27 Am. Rep. 412; Dills v. State, 34 Ohio St. 617, 32 Am. Rep. 395.

As denying right, see State v. Miller, 75 N. C. 73, qualifying State v. Collins, 70 N. C. 241, 16 Am. Rep. 771.

As to division of time under Connecticut statute, see State v. Nyman, 55 Conn. 17, 10 Atl. 161.

Subject is discussed at large in 1 Alabama L. J., pp. 345 et seq.

³ See, infra, § 1509.

on the trial.⁴ All this is an inherent function of the judge, as the presiding officer of the courtroom, charged with the preservation of order,⁵ and is a subject for his particular discretion. If, however, he goes further, and in his interference abridges the fundamental legal rights of the parties, this is ground for revision by an appellate court.⁶

§ 1496. PROSECUTING ATTORNEY NOT TO OPEN CONFESSIONS OR MATTERS OF DOUBTFUL ADMISSIBILITY, NOR UNFAIRLY PREJUDICE JURY. The prosecuting attorney opens the case, stating the facts he proposes to prove, and the law he expects to maintain.¹ If the defendant have no counsel, it is better for the prosecuting attorney simply to submit the facts without an address, or, if he speak, to limit himself to a fair and brief statement.² In the preannouncement of his case his duty is to be eminently cautious and exact.³ He has no right, either directly or indirectly, to appeal to any popular prejudice which may exist against the defendant.⁴ He has no right to refer

4 GA.—Hatcher v. State, 18 Ga. 460. IND.—Cluck v. State, 40 Ind. 263. N. Y.—Fry v. Bennett, 3 Bosw. 200, 9 Abb. Pr. 45; affirmed, 28 N. Y. 324. MO.—State v. Lee, 66 Mo. 165. N. C.—State v. Caviness, 78 N. C. 484. PA.—Thompson v. Barkley, 27 Pa. St. 263. ENG.—R. v. Courvoisier, 9 Carr. & P. 362, 38 Eng. C. L. 216.

See, *infra*, § 1513; 3 Crim. Law Mag. 621; Shars. Leg. Ethics 97.

5 Brooks v. Perry, 23 Ark. 32; see Cobb v. State, 27 Ga. 648; Morris v. State, 104 Ind. 457, 4 N. E. 148; Wartena v. State, 105 Ind. 445, 5 N. E. 20.

6 ARK.—Brooks v. Perry, 23 Ark. 32. GA.—Williams v. State, 60 Ga. 367, 27 Am. Rep. 412. IND.—Willey v. State, 52 Ind. 421. MISS.—Wings v. State, 62 Miss.

311. MO.—State v. Bryant, 55 Mo. 75. N. J.—Sullivan v. State, 47 N. J. L. 151. PA.—Stewart v. Com., 117 Pa. St. 378, 11 Atl. 370. TENN.—Kizer v. State, 80 Tenn. (12 Lea) 564.

See, also, *infra*, §§ 1787, 1822.

As illustrating this, see United States v. Fries, Pamph. 1800; Whart. St. Trials 598, and other evidence on this point in Judge Chase's impeachment.

1 See 18 Cent. L. J. 363.

2 R. v. Gascoine, 7 Carr. & P. 772, 32 Eng. C. L. 864.

If he fail to open he may lose the right to reply.—*Infra*, § 1496.

3 See State v. Meshek, 61 Iowa 316, 16 N. W. 143; State v. Schnelle, 24 W. Va. 767.

4 Ferguson v. State, 49 Ind. 33; Coble v. Coble, 79 N. C. 589, 28

to the defendant's prior character, no matter how flagrant that may have been; because character can only be put in issue by the defense.⁵ While he must open declarations as well as facts,⁶ it is indecorous for him to open confessions, evidence of which it is for the court to first weigh before it is admitted, and which only in strong cases can be made the basis of conviction.⁷ If the prosecuting officer violates these rules, the court may order a juror to be withdrawn, or, in case of conviction, a new trial may be granted when an unfair attempt to prejudice the jury has been successfully made.⁸ In general, counsel for the prosecution should consider themselves not as advocates for a party on the record, struggling for a verdict, but as ministers of public justice, called upon to develop evidence for the adjudication of the court; and any attempt on their part to pervert or misstate evidence, or to insinuate facts not capable of being put in testimony, should meet with judicial rebuke,⁹ and a new trial will be granted if by such misconduct a verdict was in part obtained.¹⁰ Except, however, in flagrant cases of surprise or fraud, objection to such misconduct in the

Am. Rep. 338; *Pierson v. State*, 18 Tex. App. 524.

⁵ IND.—*Cluck v. State*, 40 Ind. 265; *Brow v. State*, 103 Ind. 133, 2 N. W. 296. MICH.—*People v. Dane*, 59 Mich. 550, 26 N. W. 781. MISS.—*Martin v. State*, 63 Miss. 505, 56 Am. Rep. 812. N. C.—*State v. Smith*, 75 N. C. 306. TEX.—*Moore v. State*, 21 Tex. App. 666, 2 S. W. 887.

See, *infra*, § 1793.

⁶ *R. v. Davis*, 7 Carr. & P. 785, 32 Eng. C. L. 872; *R. v. Orrell*, 1 Moo. & R. 467.

⁷ See *R. v. Deering*, 5 Car. & P. 165, 24 Eng. C. L. 507; *R. v. Hartel*, 7 Car. & P. 773, 32 Eng. C. L. 865;

R. v. Davis, 7 Car. & P. 785, 32 Eng. C. L. 872.

⁸ See, *infra*, §§ 1513, 1789, 1793. IND.—*Ferguson v. State*, 49 Ind. 33; *Shepherd v. State*, 64 Ind. 43; *Brown v. State*, 103 Ind. 133, 2 N. E. 296. MO.—*State v. Mahly*, 68 Mo. 315. N. C.—*State v. Smith*, 75 N. C. 306. TEX.—*Laubach v. State*, 12 Tex. App. 583, 592.

⁹ *R. v. Berens*, 4 F. & F. 842, and cases cited, *infra*, §§ 1787, 1822.

In *People v. Benson*, 52 Cal. 381, it was said that prosecuting counsel should avoid merely technical objections to evidence. See *Com. v. Baldwin*, 129 Mass. 481.

¹⁰ *Infra*, §§ 1513, 1793.

prosecuting attorney must be made at the time.¹¹ After verdict it will be too late.¹²

§ 1497. COUNSEL ON BOTH SIDES SHOULD BE CANDID IN OPENING. The opening speeches for both prosecution and defense should be full and candid.¹ Neither party has a right to take the other by surprise by reserving the disclosure of material facts or points of law until it is too late for them to be duly weighed and examined.² If by such surprise a conviction is unfairly obtained, a new trial will be granted.³ And the court, in proper cases, will compel counsel to open in advance what they expect to prove by each particular witness offered, and will confine the witness to the evidence thus opened.⁴

§ 1498. OPENING SPEECHES NOT TO SUM UP. Ordinarily speaking, it is not permissible for counsel to argue a case when opening it. A stratagem not unknown at the bar is to break this rule by fully arguing the case in an opening, and then, by declining to address the jury in summing up, deprive the opposite party of a final reply. But where this is attempted, the court may either restrict in his opening the counsel thus proceeding, or may give to the counsel on the other side full rights to reply at the close.¹ And while counsel, in opening, may refer hypothetically to points that may possibly be made by the

¹¹ As to effect of this, see *Petite v. People*, 8 Colo. 518, 9 Pac. 622; *Epps v. State*, 102 Ind. 539, 1 N. E. 491.

¹² *Infra*, §§ 1513, 1793; and see next section.

¹ *State v. Meshek*, 61 Iowa 316, 16 N. W. 143; *State v. Sheets*, 89 N. C. 543.

² *Morales v. State*, 1 Tex. App. 494, 28 Am. Rep. 419; *R. v. Hartel*, 7 Car. & P. 773, 32 Eng. C. L. 865; *R. v. Orrell*, 1 Moo. & R. 467.

In *State v. Honlg*, 78 Mo. 249, it was decided that under the criminal code the counsel for the prosecution can not reply unless he open.

³ *Infra*, §§ 1787, 1822.

⁴ *State v. Waltham*, 48 Mo. 55; *People v. White*, 14 Wend. (N. Y.) 111.

¹ *State v. Williams*, 63 Iowa 135, 18 N. W. 682; *United States v. Mingo*, 2 Curt. 1, Fed. Cas. No. 15781.

defense, and answer such points,² yet, if this is done, counsel for the defense should be permitted to reply. But openings will not be interrupted except in clear cases of abuse.³

The order of speaking, as has just been seen, is at the discretion of the court.⁴

² *R. v. Courvoisier*, 9 Car. & P. 362, 38 Eng. C. L. 216.

³ *People v. Wilson*, 55 Mich. 506, 21 N. W. 905.

⁴ *Supra*, § 1495.

The English practice, as stated in 1871, in the 17th ed. of Archbold's C. P., is as follows: "When the prisoner is given in charge to the jury, the counsel for the prosecution, or, if there be more than one, the senior counsel, opens the case to the jury, stating the leading facts upon which the prosecution rely. In doing so, he ought to state all that it is proposed to prove, as well declarations of the prisoner's as facts, so that the jury may see if there be a discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them, per Parke, B., in *R. v. Hartel*, 7 Car. & P. 773, 32 Eng. C. L. 865; *R. v. Davis*, 7 Car. & P. 785, 32 Eng. C. L. 872.

—Unless such declarations should amount to a confession, where it would be improper for counsel to open them to the jury. —Per Bosanquet, J., and Patterson, J., *R. v. Swatkins*, 4 Car. & P. 548, 19 Eng. C. L. 643; per Parke, B., *R. v. Davis*, 7 Car. & P. 786, 32 Eng. C. L. 872; per Boland, B., *R. v. Patience*, 7 Car. & P. 775, 32 Eng. C. L. 866.

—The reason for this rule is, that the circumstances under

which the confession was made may render it inadmissible in evidence.

"The general effect only of any confession said to have been made by a prisoner ought, therefore, to be mentioned in the opening address of the prosecuting counsel. When any additional evidence, not mentioned in the opening speech of counsel, is discovered in the course of a trial, counsel is not allowed to state it in a second address to the jury. *R. v. Courvoisier*, 9 Cr. & P. 362, 38 Eng. C. L. 216. It may further be remarked, that, in opening a case for murder, the counsel for the prosecution may put hypothetically the case of an attack upon the character of any particular witness for the crown, and say that should any such attack be made he shall be prepared to meet it. Per Tindal, C. J., and Parke, B., *ibid.* 362. He may, also, as it was ruled by the same learned judges, read to the jury the observations of a judge in a former case, as to the nature and effect of circumstantial evidence, provided he adopts them as his own opinions, and makes them part of his address to the jury.

"And in *R. v. Dowling*, Central Criminal Court, 1848, the attorney-general having, in his opening address to the jury, made reference to disturbances in Ireland, Erle, J.,

§ 1499. **EXAMINATION OF WITNESSES AT DISCRETION OF COURT.** The opening of the prosecution is followed by the introduction of the prosecution's testimony.¹ Whether more than one counsel can take part in the examining of witnesses is a matter regulated either by local usage, or by rules of court. Unless limited, the usual course is for the junior counsel, who is supposed to be more familiar with the testimony, to begin the examination of each particular witness, and for the examination to be taken up by the senior counsel on the same side.² It is scarcely necessary to say that it is incumbent on the prosecution to prove, either expressly or by implication, all the essential ingredients of its case.³

§ 1500. **PROSECUTION MUST CALL ALL WITNESSES TO GUILTY ACT.** The prosecution is not at liberty to put in part of the evidence making out its case, and then rest. It is bound, under ordinary circumstances, and when this can be done without undue cumulation of testimony,¹ to call the witnesses present at the commission of the act which is the subject of the indictment,² and it is a breach of official

held, on objection made, that such reference was not irregular, it being laid down in books of evidence that allusion might be made in courts of justice to notorious matters, even of contemporaneous history."

¹ See *Willey v. State*, 52 Ind. 421, where a case was reversed because the court below required the defense to open immediately after the opening of the prosecution.

² That the court may limit the number of impeaching witnesses, see *Wh. Cr. Ev.*, § 487.

In *State v. Bryant*, 55 Mo. 75, where two defendants in a criminal trial were represented each by separate counsel, and required

different defenses, it was ruled, that a rule of court forbidding more than one counsel on either side to examine witnesses, in so far as it deprived either of said attorneys of the right to cross-examine witnesses, was null and void.

³ 2 *Whart. Cr. Ev.* (Hilton's ed.), § 319. The modes in which witnesses may be attacked and supported are elsewhere discussed. See 2 *Whart. Cr. Ev.* (Hilton's ed.), §§ 481-495.

¹ That this is unnecessary, see *R. v. Ritson*, 50 L. T. N. S. 727; *Winsett v. State*, 56 Ind. 26; *Bowker v. People*, 37 Mich. 5.

² See cases cited in 2 *Whart. Cr. Ev.* (Hilton's ed.), § 448. See,

duty for a prosecuting officer not to open and present all material evidence of this class.³ (In any view, all witnesses on the back of the indictment must be summoned by the prosecution,⁴ so that, when not called by the prose-

also, *State v. Johnson*, 76 Mo. 121; *State v. Smallwood*, 75 N. C. 109; *State v. Magoon*, 50 Vt. 338; *R. v. Stroner*, 1 Car. & K. 650, 47 Eng. C. L. 650; *R. v. Holden*, 8 Car. & P. 606, 34 Eng. C. L. 917.

In *Donaldson v. Com.*, 95 Pa. St. 21, it was held that it was the duty of the prosecuting attorney, in a rape case, to call the physician by whom the prosecutrix was examined immediately after the assault. And see *Ter. v. Hanna*, 5 Mont. 246, 5 Pac. 250.

In *Hurd v. People*, 25 Mich. 405, the court say: "The prosecution can never, in a criminal case, claim a conviction upon evidence which expressly or by implication shows but a part of the *res gestæ*, or whole transaction, if it appear that the evidence of the rest of the transaction is attainable. This would be to deprive the defendant of the benefit of the presumption of innocence, and to throw upon him the burden of proving his innocence. . . . According to the well established rules of the English courts, all the witnesses present at the transaction should be called by the prosecution before the prisoner is put to his defense, if such witnesses be present or clearly attainable." See *Maher v. People*, 10 Mich. 212, 225, 226, 81 Am. Dec. 781.

The English rule goes so far as to require the prosecutor to produce all present at the transaction, though they may be the near relatives of the prisoner. See Chap-

man's Case, 8 Car. & P. 559, 34 Eng. C. L. 890; *Orchard's Case*, *ibid.*, note; *Roscoe's Crim. Ev.* 164.

Doubtless, where the number present has been great, production of a part of them might be dispensed with, after so many had been sworn as to lead to the inference that the rest would be merely cumulative, and there is no ground to suspect an intent to conceal a part of the transaction. Whether the rule should be enforced in all cases, as where those not called are near relatives of the prisoner, or some other special cause for not calling exists, we need not determine; but certainly, if the facts stated by those who are called show *prima facie*, or even probable, reason for believing that there are other parts of the transaction to which they have not testified, and which are likely to be known by other witnesses present at the transaction, then such other witnesses should be called by the prosecution, if attainable, however nearly related to the prisoner. See, also, *R. v. Holden*, 8 Car. & P. 606, 609, 34 Eng. C. L. 917; *Thomas v. People*, 39 Mich. 309; *People v. Gordon*, 40 Mich. 716.

³ See *R. v. Thursfield*, 8 Car. & P. 269, 34 Eng. C. L. 727.

⁴ See 2 Whart. Crim. Ev. (Hilton's ed.), § 448, and see, to this effect, *R. v. Simmonds*, 1 Car. & P. 84, 12 Eng. C. L. 59; *R. v. Whitrehad*, 1 Car. & P. 67, 12 Eng. C. L. 49.

cution,⁵ they can be called for the defense;⁶ but, if so called, they become the defendant's witnesses.⁷ The practice as to indorsing witnesses has been already discussed.⁷

§ 1501. — WHEN NOTICE OF, MUST BE GIVEN TO DEFENDANT. The Revised Statutes of the United States, Sec. 1033,¹ provide for the delivery to the defendant of a copy of the indictment and of a list of the witnesses two days before the trial begins. Under this statute the delivery must be made two days prior to the swearing of the jury; and a delivery is not in time if made after the trial begins, though the court should adjourn three days so as to prevent a surprise to the defendants.²

§ 1502. ORDER OF TESTIMONY DISCRETIONARY WITH COURT. The order of testimony is for counsel to arrange, subject to the discretion of the court.¹ The general rules pre-

If the prosecutor does not call any witnesses so indorsed, the judge may.—*Ibid.*; *R. v. Bodle*, 6 Car. & P. 186, 25 Eng. C. L. 386.

⁵ This is not obligatory. See *State v. Eaton*, 75 Mo. 586; *State v. Cain*, 20 W. Va. 679.

⁶ *Morrow v. State*, 57 Miss. 836; *R. v. Woodhead*, 2 Car. & K. 520, 61 Eng. C. L. 519; see *R. v. Gordon*, 2 Dowl. 417; *R. v. Cassidy*, 1 F. & F. 79.

As to the duty of the prosecution to call all the witnesses to the act, see *Harrison v. Bank*, cited *London Law Times*, July 5, 1844, p. 174, where Lord Coleridge maintained that it was the duty of the prosecution to make a candid exposition of all relevant evidence in their possession.

⁷ *Supra*, § 1285.

¹² Fed. Stats. Ann., 1st ed., p. 344; 2 Fed. Stats. Ann., 2d ed., p. 688.

² *United States v. Neverson*, 1 Mack. (D. C.) 152.

¹ Archbold's C. P., 17th ed., 296. CAL.—*People v. Cotta*, 49 Cal. 166. IOWA.—*Herring v. State*, 1 Iowa 205; *State v. Ruhl*, 8 Iowa 447; *State v. Porter*, 34 Iowa 241; *State v. Bruce*, 48 Iowa 330. LA.—*State v. Colbert*, 29 La. Ann. 715. MO.—*State v. Linney*, 52 Mo. 40. N. Y.—*Wilke v. People*, 53 N. Y. 525, 1 Cow. Cr. Rep. 541; *McCarney v. People*, 83 N. Y. 408, 38 Am. Rep. 456. N. C.—*State v. Haynes*, 71 N. C. 79; *State v. Laxton*, 78 N. C. 564. OHIO.—*Webb v. State*, 29 Ohio St. 351. TENN.—*Dove v. State*, 50 Tenn. (3 Heisk.) 348. VT.—*State v. Blodgett*, 50 Vt. 142; *State v. Magoon*, 50 Vt. 333. ENG.—*Queen's Case*, 2 Brod. & B. 302, 6 Eng. C. L. 156; *Doe v. Roe*, 2 Camp. 280, 11 Rev. Rep. 711; *Creevy v. Carr*, 7 Car. & P. 64, 32 Eng. C. L. 501; *R. v. Burdett*, 1 Dears. 431; *R. v. Wood*, 6 Cox C. C. 224, and see, fully, Whart. Crim. Ev., § 493.

In English practice, formerly it

scribed,—e. g., that each party must make out its case in its evidence in chief,—are founded on right reason, and will be usually maintained. But it is within the discretion of the court trying the case to permit these rules to be suspended for the purpose of justice; and a deviation in this respect from the usual practice is not a subject for revision by an appellate court.² Even after a case is

was held that objection for incompetency must have been made before the witness was sworn in chief; but it has been generally allowed to be made at any time during the trial.—*Stone v. Blackburn*, 1 Esp. 37; *Turner v. Pearte*, 1 T. R. 717, 99 Eng. Repr. 1339.

—As to English practice in this regard, see *Hartshorne v. Watson*, 5 Bing. N. C. 477, 35 Eng. C. L. 258; *Dewdney v. Palmer*, 4 Mees. & W. 664; *Yardley v. Arnold*, 10 Mees. & W. 141; *Jacobs v. Layborn*, 11 Mees. & W. 685; *Wollaston v. Hakewills*, 3 Scott N. R. 593.

As to competency of witnesses, see 2 Whart. Crim. Ev. (Hilton's ed.), §§ 357 et seq.

—In England, if a judge has admitted a witness as competent to give evidence, but upon proof of subsequent facts affecting the capacity of the witness, and upon observation of his subsequent demeanor, the judge changes his opinion as to his competency, the judge may stop the examination of the witness, strike his evidence out of his notes, and direct the jury to consider the case exclusively upon the evidence of the other witnesses.—*R. v. Whitehead*, L. R. 1 C. C. 33; 35 L. T. M. C. 186; *Archbold's C. P.*, 17th ed., 296.

See further as to English prac-

tice, *R. v. White*, 3 Camp. 98, 13 Rev. Rep. 765; *Parker v. Moon*, 7 Car. & P. 408, 32 Eng. C. L. 630; *R. v. Parkins*, 1 Ry. & M. 168, 21 Eng. C. L. 723; *R. v. Hardy*, 24 How. St. Tr. 755.

See, also, *infra*, § 1515.

It is not usual to cross-examine witnesses to character, unless the counsel cross-examining have some distinct charge on which to cross-examine them (see *R. v. Hodgkiss*, 7 Car. & P. 298, 32 Eng. C. L. 623); and if the only evidence called on the prisoner's part is evidence as to character, though the counsel for the prosecution is in strictness entitled to a reply, it is not usual to exercise it, except in extreme cases. See *R. v. Stannard*, 7 Car. & P. 673, 32 Eng. C. L. 816; *R. v. Whiting*, *ibid.* 771; *Archbold's C. P.*, 17th ed., 296; *infra*, § 573.

For American authorities as to cross-examination, see 2 Whart. Crim. Ev. (Hilton's ed.), §§ 481 et seq.

² CONN.—*State v. Alford*, 31 Conn. 40; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89. ILL.—*Bulliner v. People*, 95 Ill. 394. ME.—*Mudge v. Pierce*, 32 Me. 165. MASS.—*Com. v. Moulton*, 70 Mass. (4 Gray) 39; *Chadbourn v. Franklin*, 71 Mass. (5 Gray) 312; *Day v. Moore*, 79 Mass. (13 Gray) 522; *Com. v. Dam*, 107 Mass. 210. N. Y.—*Bedell*

closed, evidence will be received, if the party was not able to produce it in due time.³ But, though ordinarily this is not the subject of error,⁴ it is otherwise when the decision of the court invades fundamental rules of law.⁵ Thus, it is error to suffer to go to the jury any evidence given by a witness on direct examination, where by sudden illness or by death of such witness, or other cause without the fault of and beyond the control of the opposing party, he is deprived of his right of cross-examination.⁶

§ 1503. IMPEACHING TESTIMONY MAY BE RESTRICTED. When a party introduces witnesses to impeach a witness produced by the opposing party, it is within the discretion of the court to limit the number of impeaching witnesses to be produced.¹

§ 1504. WITNESS TO SEE WRITINGS BEFORE CROSS-EXAMINATION. When a witness is to be impeached by written statements alleged to have been made by him, the writing, at common law, should be submitted to him for examination.¹

v. Powell, 13 Barb. 184. PA.—Finlay v. Stewart, 56 Pa. St. 183. OHIO—Webb v. State, 29 Ohio St. 351. S. C.—State v. Clyburn, 16 S. C. 375. FED.—United States v. Noelke, 17 Blatchf. 554, 1 Fed. 426.

As to Texas statute, see Donahoe v. State, 12 Tex App. 297. *Infra*, § 1711.

³ See, *infra*, § 1802; 2 Whart. Crim. Ev. (Hilton's ed.), §§ 446, 493 et seq.; Com. v. Blair, 126 Mass. 40.

⁴ See 2 Whart. Crim. Ev. (Hilton's ed.), § 495. See, *infra*, § 1715.

⁵ Thompson v. State, 37 Tex. 121.

⁶ People v. Cole, 43 N. Y. 508; 1 Cow. Cr. Rep. 295.

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As to negligence of counsel in this respect, see, *infra*, § 1740.

¹ People v. Murray, 41 Cal. 66. See 2 Whart. on Ev. (Hilton's ed.), § 505; *supra*, § 1495.

¹ Whart. Crim. Ev. (Hilton's ed.), § 156; Roscoe's Crim. Ev., § 13. GA.—Stamper v. Griffin, 12 Ga. 450. MICH.—Smith v. People, 2 Mich. 415. MISS.—Cavanah v. State, 56 Miss. 299. N. Y.—Gaffney v. People, 50 N. Y. 416, 1 Cow. Cr. Rep. 526; People v. Finnegan, 1 Park. Cr. Rep. 147. N. C.—State v. George, 30 N. C. (8 Ired.) 324, 49 Am. Dec. 392.

Contra: Randolph v. Woodstock, 35 Vt. 291.

§ 1505. WITNESSES MAY BE EXCLUDED FROM COURT-ROOM. It is within the power of the court to order that the witnesses should be excluded from the court-room, with the exception of a particular witness under examination, and witnesses by whom this demand is disobeyed may be, as to credibility, open to grave criticism, and punished for contempt.¹ At the same time, the action of the court trying the case will not be revised in this respect in error, unless it appear that manifest injustice has been done.² And the disobedience of a witness in this respect, unless promoted by the successful party, is not ground for a new trial.³

§ 1506. DEFENDANT'S OPENING TO BE RESTRICTED TO ADMISSIBLE EVIDENCE. The opening of the defense is, by the usual American practice, assigned, when there are two counsel, to the junior. In two respects, greater liberty is allowed to counsel in this opening than is usual in the opening for the prosecution. (1) Counsel, in opening for the defense, may comment on the prosecution's case.¹ (2) As the defendant is at liberty to put his character in issue, so his counsel may open on the subject of character. But it was formerly held irregular for counsel to introduce into an opening the defendant's own statement of his case, except so far as this statement can be supported by testimony aliunde;² and although this restriction can not be maintained in those states in which defendants can be examined as witnesses in their own behalf, yet the opening must, even in those states, be lim-

¹ Whart. Crim. Ev. (Hilton's ed.), § 446; *R. v. Wylde*, 6 Car. & P. 380, 25 Eng. C. L. 484; *People v. Sprague*, 53 Cal. 422.

² *Laughlin v. State*, 18 Ohio St. 99; *R. v. Brown*, 4 Car. & P. 588 n., 19 Eng. C. L. 662; *R. v. Murphy*, 8 Car. & P. 297, 34 Eng. C. L. 744; *R. v. Colley*, Mees. & M. 329.

See, *infra*, § 1711.

³ See 2 Whart. Crim. Ev. (Hilton's ed.), § 446, for cases.

¹ Such is the English practice; otherwise in New York, in civil cases.—*Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229.

² *R. v. Butcher*, 2 Moo. & R. 229; *R. v. Beard*, 8 Car. & P. 142, 34 Eng. C. L. 655.

ited to what the defendant expects to swear to. Nor is it proper for counsel, in any stage of the case, to state their personal conviction of their client's innocence. To do so is a breach of professional privilege, well deserving the rebuke of the court. On legal evidence alone can the case be tried; and that which would be considered a high misdemeanor in third parties can not be permitted to counsel.³ And where any undue or irregular comment by counsel can not be stopped at the time by the court, the mischief may be corrected by the court when charging the jury, or on a motion for a new trial.⁴

§ 1507. **READING BOOKS AT DISCRETION OF COURT.** Whether counsel, in argument, will be allowed to read books to the jury, is a matter resting within the discretion of the court;¹ but a court should not permit the reading law to a jury when the effect would be to mislead.² As a general rule, books of inductive science are per se inadmissible;³ and permission should not be given to read extracts from such books,—e. g., medical treatises,—to the jury.⁴ This

³ See, *infra*, §§ 1513, 1768, 1787-1792.

⁴ CAL.—*People v. Tyler*, 36 Cal. 522. IND.—*Dalley v. State*, 28 Ind. 285. MO.—*State v. Mahly*, 68 Mo. 315. N. C.—*State v. O'Neal*, 29 N. C. (7 Ired. L.) 251; *State v. Whit*, 50 N. C. (5 Jones L.) 224, 72 Am. Dec. 533. PA.—*Com. v. Smith*, 10 Phila. 189. TENN.—*Northington v. State*, 82 Tenn. (14 Lea) 424. TEX.—*Collins v. State*, 20 Tex. App. 255; *McInturf v. State*, 20 Tex. App. 336; *Bend v. State*, 20 Tex. App. 422. VT.—*State v. Cameron*, 40 Vt. 555. ENG.—*R. v. Berens*, 4 F. & F. 842.

See, *infra*, § 1513.

¹ *Smith v. State*, 21 Tex. App. 277, 17 S. W. 471.

Question generally discussed in 2 Whart. Crim. Ev. (Hilton's ed.),

§§ 537-539; *Collins v. State*, 20 Tex. App. 400.

Book read on one side may be freely criticized on the other. See *Jones v. State*, 65 Ga. 506; and see *Lott v. State*, 18 Tex. App. 627.

Prosecuting attorney read part of an essay of his own on the subject of duelling, in a homicide case, held in Mississippi no ground for reversal. — *Cavanah v. State*, 56 Miss. 94, 99, 17 Am. Rep. 663.

² See, *infra*, §§ 1514, 1744, 1752; *State v. Klinger*, 46 Mo. 224; *Earll v. People*, 99 Ill. 123.

³ 2 Whart. Crim. Ev. (Hilton's ed.), § 538. See 9 Crim. Law Mag. 768.

⁴ CAL.—*People v. Wheeler*, 60 Cal. 580. ILL.—*Gale v. Rector*, 5 Bradw. 481. MASS.—*Com. v. Sturtevant*, 117 Mass. 139. N. C.—*Mel-*

rule, however, has been relaxed where the court has received evidence to show that the book in question was recognized as authority,⁵ and where the passage was read as a hypothetical illustration.⁶ But when such extracts are read the court should instruct the jury they are mere speculations of scientists.⁷ And even when this has been done it may be doubted whether the admission is validated.⁸

§ 1508. COUNSEL MAY EXHIBIT MECHANICAL EVIDENCE IN PROOF. Counsel have the right to handle, exhibit, and comment on any of the mechanical indicatory evidence produced in the case; e. g., a stick or weapon proved to have been used.¹

§ 1509. IF DEFENDANT HAS NO EVIDENCE, HIS COUNSEL CLOSE. Should the defense offer no evidence, the defendant's counsel, by the usual practice, open and close the summing up; and the same rule may be accepted where the defendant only calls witnesses to character.¹

§ 1510. — OTHERWISE WHEN THERE IS EVIDENCE. If the defendant has evidence to offer, this must be specifically opened, as has been just seen; and when the evi-

vin v. Easley, 46 N. C. (1 Jones L.) 386, 62 Am. Dec. 171. ENG.—R. v. Taylor, 13 Cox C. C. 77.

⁵ Merkle v. State, 37 Ala. 139.

⁶ Union Ins. Co. v. Cheever, 36 Ohio St. 201, 38 Am. Rep. 573.

⁷ Harvey v. State, 40 Ind. 516; Yoe v. People, 49 Ill. 410.

⁸ People v. Wheeler, 60 Cal. 580; infra, § 1741.

¹ 1 Whart. Crim. Ev. (Hilton's ed.), § 312.

As to presumptions in such cases, see 2 Whart. Crim. Ev. (Hilton's ed.), §§ 764-780; see State v. Smith, 49 Conn. 376; Polin v. State, 14 Neb. 540, 16 N. W. 898.

¹ R. v. Dowse, 4 F. & F. 492; Pateson's Case, 2 Lew. C. C. 262.

As recommending this, and yet as holding that in strict law the distinction can not be enforced, see R. v. Jordan, 9 Cr. & P. 118, 38 Eng. C. L. 80; and, also, see R. v. Stannard, 7 Car. & P. 673, 32 Eng. C. L. 816; R. v. Christie, 1 F. & F. 75; R. v. Toakley, 10 Cox C. C. 406; and, supra, §§ 1498, 1502; Farrow v. State, 48 Ga. 30; Cruce v. State, 59 Ga. 83.

A contrary practice, giving the prosecution the reply in all cases, seems to be sanctioned in some jurisdictions.—See Doss v. Com., 42 Va. (1 Gratt.) 557.

dence on both sides is closed, the counsel for the prosecution begin the summing up, are followed by the counsel for the defense, and then reply, closing the argument of the case.

§ 1511. DEFENDANTS MAY SEVER. When there are several defendants, and they sever in their defenses, if one calls witnesses and the other does not, the right of reply, where the defenses are distinct, is confined to the case against the defendant who has called witnesses;¹ though it is otherwise where the offenses are identical.²

§ 1512. PRIORITY OF SPEECHES AT DISCRETION OF COURT. Where there are two or more counsel, the order in which they speak is determined by the court,¹ reserving always,

¹ *R. v. Burton*, 2 F. & F. 788. See, supra, §§ 351-360.

² *R. v. Blackburn*, 3 Car. & K. 330, 6 Cox C. C. 333.

¹ Supra, § 1495.

"In exercising this right of summing up evidence, it is not proper for the counsel for the prosecution to comment on the absence of witnesses for the defense, unless it might be fairly expected that witnesses should be called, or to urge on a trial for rape, as an argument for conviction, that otherwise the character of the prosecutrix would be blasted.—*R. v. Rudland*, 4 F. & F. 495; *R. v. Puddick*, *ibid.* 497.

Nor is it the duty of counsel for the prosecution to sum up in every case in which the prisoner's counsel does not call witnesses. The statute gives him the right to do so, but that right ought only to be exercised in exceptional cases, such as where erroneous statements have been made and ought to be corrected, or where the evidence differs from the instruc-

tions. The counsel for the prosecution is to state his case before he calls the witnesses; then, when the evidence has been given, either to say simply, "I say nothing," or "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct"; or, in exceptional cases, to say, "something is proved different to what I expected," and add any suitable explanation which is required.—*R. v. Holchester*, 10 Cox C. C. 226, per Blackburn, J.; *R. v. Berens*, 4 F. & F. 842. See, also, *R. v. Webb*, 4 F. & F. 862.

Where two prisoners are jointly indicted, and are defended by different counsel, each counsel cross-examines and addresses the jury for his client, in the order of seniority at the bar; but where the judge thinks it desirable, he will permit the counsel to cross-examine and address the jury, not in the order of seniority, but in that in which the names stand on the indictment.—*Per Rolfe, B.*, 2 M. &

when evidence has been introduced on both sides, to the counsel for the prosecution to open and close the summing up,² though it may be otherwise as we have seen, when no testimony (an unsworn statement not being testimony) is given for the defense.³ One rule in this respect is particularly to be observed. Counsel for the prosecution, in the closing speech, can take no points of which notice was not given prior to the speech of the counsel for the defense. If such new points be taken, then counsel for the defense may specially reply.⁴

§ 1513. MIS-STATEMENTS NOT GROUND FOR NEW TRIAL IF NOT OBJECTED TO AT TIME. A new trial will not be granted because the prosecuting attorney in his argument states matters not in evidence, or makes improper comments, the court not at the time being called upon to interfere,¹ or when the court tells the jury not to be influenced by such remarks.² If the opposing counsel let the matter pass at the time without objection, after verdict objection is too late.³ But it is otherwise when such misconduct, being

Rob. 417; and this course was allowed by Creswell, J., York Spr. Ass. 1852, MS.; and see R. v. Barber, 1 Car. & K. 434, 47 Eng. C. L. 433; Archbold C. P., 17th ed., 296.

² State v. Smith, 10 Nev. 106.

³ Farrow v. State, 48 Ga. 30; supra, § 1509.

⁴ R. v. Madden, 12 Cox C. C. 239.

¹ CAL.—People v. Barhart, 58 Cal. 402. GA.—Davis v. State, 33 Ga. 98; Scarborough v. State, 46 Ga. 26. ILL.—Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698. IND.—Gilloolly v. State, 58 Ind. 182; Richie v. State, 59 Ind. 121; Choen v. State, 85 Ind. 209. MO.—State v. Banks, 10 Mo. App. 111. N. C.—State v. Sheets, 89 N. C. 543; State v. Lewis, 93 N. C. 581. PA.—Com. v. Hanlon, 3 Brewst. 461.

See, supra, § 1496; infra, § 1793.

² State v. Degonia, 69 Mo. 485; State v. Braswell, 82 N. C. 693; State v. Sheets, 89 N. C. 543; State v. Wilson, 89 N. C. 736.

A party who, by his misconduct, provokes the opposing counsel to a denunciatory reply, can not be heard to complain of such reply.—Eames v. State, 10 Tex. App. 421.

³ Ibid. Supra, § 1496; infra, § 1793. GA.—Turner v. State, 70 Ga. 767. ILL.—Garrity v. People, 107 Ill. 162. IND.—Bessetts v. State, 101 Ind. 86. IOWA.—State v. Graham, 62 Iowa 108, 17 N. W. 192. KAN.—State v. Mosley, 31 Kan. 355, 2 Pac. 782. MO.—State v. Degonia, 69 Mo. 486; State v. Mallon, 75 Mo. 355. N. C.—State v. Snuggs, 89 N. C. 527; State v. Bryan, 89 N. C. 531; State v.

calculated to prevent justice, is sanctioned by the court on trial,⁴ or when the court has not had the opportunity of correcting the wrong impression.⁵

Sheets, 89 N. C. 544. ORE.—State v. Lee Ping Bow, 10 Ore. 27; State v. Abrams, 11 Ore. 169, 8 Pac. 327. TEX.—Crawford v. State, 15 Tex. App. 501; Mason v. State, 15 Tex. App. 534.

On this topic generally, articles in 16 Cent. L. J. 506; 18 Cent. L. J. 363 et seq.; 27 Cent. L. J. 82; 9 Crim. L. Mag. 741.

As to latitude to be allowed to counsel, see State v. Zumbunson, 86 Mo. 111; Proffatt on Jury Trials, § 250.

4 ARK.—Ford v. State, 34 Ark. 649. ILL.—Fox v. People, 95 Ill. 71. IND.—Ferguson v. State, 49 Ind. 33; Combs v. State, 75 Ind. 215. LA.—State v. Cason, 28 La. Ann. 40. MICH.—Sullivan v. People, 31 Mich. 1. MO.—State v. Ford, 71 Mo. 200; State v. Emory, 79 Mo. 461. NEB.—Bradshaw v. State, 17 Neb. 147, 22 N. W. 361. N. C.—State v. Smith, 75 N. C. 306; State v. Underwood, 77 N. C. 502; State v. Matthews, 80 N. C. 417; State v. Noland, 85 N. C. 576. TENN.—Turner v. State, 72 Tenn. (4 Lea) 206. TEX.—Grosse v. State, 11 Tex. App. 364; Conn v. State, 11 Tex. App. 390; Laubach v. State, 12 Tex. App. 583.

See, *infra*, § 1793.

As to interruptions generally, see Hanson v. State, 78 Ala. 5.

Court has the right to prevent counsel from making unwarranted statements.—See, *infra*, §§ 1793, 1899; State v. Dodson, 16 S. C. 453; Northington v. State, 82 Tenn. (14 Lea) 424; Cross v. State, 68 Ala. 476.

Any unfairness by the prosecution may be ground for a new trial.—See, *infra*, § 1793; and see Young v. State, 19 Tex. App. 537; Kennedy v. State, 19 Tex. App. 620.

5 State v. Gay, 69 Mo. 430; State v. Zumbunson, 9 Mo. App. 526 (though see same case in error, State v. Zumbunson, 86 Mo. 111); Com. v. Smith, 10 Phila. 189; Hatch v. State, 8 Tex. App. 416, 34 Am. Rep. 751.

In Arnold v. People, 75 N. Y. 603, it was said by the Court of Appeals that that court did not sit as an arbiter morum in respect to the manners of counsel in trial courts.

A Utah statute provided that on a new trial the "former verdict can not be used or referred to," etc. An allusion by the prosecuting counsel to the case having been many times brought before the tribunal, does not conflict with the statute.—Hopt v. People of Utah, 120 U. S. 430, 30 L. Ed. 708, 7 Sup. Ct. 614.

Court may interfere without waiting for counsel to object, in some jurisdictions.—See Berry v. State, 10 Ga. 511; Willis v. McNeill, 57 Tex. 465; 9 Cr. Law Mag. 744.

Mere vituperative declamation, sustainable as a probable argument from the facts in the case, and not in itself introducing any new facts, is not by itself ground for new trial.—See State v. Hamilton, 55 Mo. 37; State v. Estes, 70 Mo. 428; State v. Stark, 72 Mo. 37;

§ 1514. ORDINARILY COUNSEL NOT TO ARGUE LAW TO JURY. A new trial, it has been held in Louisiana, a state in which the jury are held to be judges of the law, will not be granted because the court refused to permit counsel to argue to the jury a question of irrelevant law.¹ And a fortiori is this the case where counsel, after asking the judge to charge on the law, attempt to argue against the charge.² But though, in such jurisdictions, counsel may argue the law under the direction of the court,³ in those jurisdictions where the jury are bound to take the law from the court it is plainly within the power of the court to stop counsel when appealing to the jury to decide the law in opposition to the court.⁴ And in the latter jurisdictions, the court will stop counsel attempting to argue questions of law, or to read legal rulings to the jury, and will require them to address the argument to the court.⁵ But while this is the case, there may nevertheless be exceptional instances in which it is permissible for counsel, by way of illustration, to read to the jury reported cases or extracts from text-books, subject to the sound discretion of the court, whose duty at the same time is to check promptly any effort on the part of counsel to induce the jury to disregard the instructions, or to take the law of

Pierson v. State, 18 Tex. App. 524; 9 Cr. L. Mag. 762.

As taking a dangerously lax view of judicial duty in this respect, see Hall v. Wolff, 61 Iowa 559, 562, 16 N. W. 710.

¹ State v. McCort, 23 La. Ann. 326.

² Edwards v. State, 22 Ark. 253. See fully, *infra*, §§ 1749-1752.

³ McMath v. State, 55 Ga. 303.

⁴ See, *infra*, § 1749.

⁵ People v. Anderson, 44 Cal. 65; Davenport v. Com., 28 Va. (1 Leigh) 589; United States v. Shive,

1 Bald. 510, 512, Fed. Cas. No. 16278 (where counsel were stopped when arguing the constitutionality of a law; and, generally); United States v. Riley, 5 Blatchf. 204, Fed. Cas. No. 16164; and other cases cited *infra*, § 1749.

In State v. Klinger, 46 Mo. 224, it was held that counsel could not read law books to the jury, when the effect was to mislead. Nor can counsel read the opinion of the appellate court on the former trial of the same case.—See Bangs v. State, 61 Miss. 363.

the case from the books rather than from the court.⁶ But there will be no reversal for an error that did no harm.⁷

§ 1515. PARTY MAY MAKE STATEMENT TO JURY. At common law a defendant has a right to make a statement to the jury.¹ It was at one time held in England that when he is defended by counsel he should not, unless under peculiar circumstances, be allowed to make such statement to the jury before his counsel addresses them.² It has been also said that where two defendants are indicted together, and one of them only is defended by counsel, it is in the discretion of the judge whether he will allow the defendant who is undefended to make his statement to the jury before or after the address of counsel.³ But the prevalent opinion in England now is that he is at common law entitled in all cases to address the jury on the facts,

⁶ *People v. Anderson*, 44 Cal. 65.

Jury may be required to retire when counsel are arguing as to admissibility of evidence.—See *Krance v. State*, 61 Miss. 158; *Allison v. State*, 14 Tex. App. 402. In this case *Crockett, J.*, said:

"As a general rule, the practice of allowing counsel, in either a civil or criminal action, to read law to the jury, is objectionable, and ought not to be tolerated. Its usual effect is to confuse rather than to enlighten the jury. There are cases, however, in which it is permissible for counsel, by way of illustration, to read to the jury reported cases, or extracts from text-books, subject to the sound discretion of the court, whose duty it is to check promptly any effort on the part of counsel to induce the jury to disregard the

instructions, or to take the law of the case from the books rather than from the court."

⁷ *House v. State*, 19 Tex. App. 227.

¹ See 1 Whart. Cr. Ev. (Hilton's ed.), § 427, where the cases are discussed.—*R. v. Malings*, 8 Car. & P. 242, 34 Eng. C. L. 712; *De Foe v. People*, 22 Mich. 224; *Farlow v. State*, 48 Ga. 30.

² *R. v. Rider*, 8 Car. & P. 539, 34 Eng. C. L. 880; *R. v. Malings*, 8 Car. & P. 242, 34 Eng. C. L. 712; *R. v. Manzano*, 2 F. & F. 64.

Compare: *R. v. White*, 3 Camp. 98, 13 Rev. Rep. 765, cited supra, § 1502.

³ *Archbold's C. P.*, 17th ed. (1871), p. 159.

May cross-examine witnesses, availing himself of the suggestions of his counsel as to the

if he desire,⁴ and that when he has counsel, this address may be made after his counsel has closed.⁵

In jurisdictions, however, in which the defendant is entitled to be examined under oath, such unsworn statements are secondary, and can not be received.⁶

proper course.—See *R. v. Parkins*, Ry. & M. 168, cited supra, § 1502.

⁴ 1 Whart. Cr. Ev. (Hilton's ed.), § 427; *Higginbotham v. State*, 19 Fla. 557. See Lond. Law Times, Feb. 21, 1880, for review of cases.

Contra: *Ford v. State*, 34 Ark. 649.

⁵ *R. v. Shimmir*, London Law Times, May 13, 1882, p. 29.

⁶ *Com. v. Scott*, 123 Mass. 222, 35 Am. Rep. 81.

CHAPTER XC.

MOTION FOR CONTINUANCE AND CHANGE OF VENUE.

I. ON APPLICATION OF PROSECUTION.

§ 1516. By statute in some states trial must be prompt.

II. ON APPLICATION OF DEFENDANT.

§ 1517. In general.

1. *Absence of Material Witness.*

§ 1518. Such absence ground for continuance if due diligence is shown.

§ 1519. — And so on unauthorized withdrawal of witness.

§ 1520. Continuance not granted when witness was out of jurisdiction of court, or of uncertain attendance.

§ 1521. — Not granted when there has been laches.

§ 1522. — Or unless there was due diligence.

§ 1523. — Not granted when testimony is immaterial.

§ 1524. Affidavit must be special.

§ 1525. Impeaching witnesses, and witnesses to character, not generally "material."

§ 1526. If object be delay, reason ceases.

§ 1527. Refusal cured by subsequent examination of witness.

§ 1528. Usually continuance is refused when opposite party concedes facts.

§ 1529. Not granted when witness had notice, unless he secretes himself.

2. *Inability of Defendant or Counsel to Attend.*

§ 1530. Inability to attend may be a ground for continuance.

3. *Improper Prejudice of Cause or Surprise.*

§ 1531. Continuance granted when there has been undue prejudice of case. And so of surprise.

§ 1532. Treachery of counsel.

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4. Inability of Witness to Understand Oath.

§ 1533. In such case continuance may be granted.

5. Pendency of Civil Proceedings.

§ 1534. As ground for continuance.

III. NEW TRIAL.

§ 1535. For refusal to give continuance new trial may be granted.

IV. QUESTION IN ERROR.

§ 1536. Refusal to continue not usually subject of error.

V. CHANGE OF VENUE.

§ 1537. On due cause shown venue may be changed.

I. ON APPLICATION OF THE PROSECUTION.

§ 1516. BY STATUTE IN SOME STATES TRIAL MUST BE PROMPT. Provisions exist, as has been noticed, in several of the states, requiring trials in criminal cases to take place within a specified period from the institution of the prosecution.¹ An arbitrary refusal on the part of the state to prosecute may, under these statutes, not only release but bar further prosecution.²

II. ON APPLICATION OF THE DEFENDANT.

§ 1517. IN GENERAL. Continuances on motion of the defendant, may be granted on three principal grounds:

¹ See, *supra*, § 379.

As to Massachusetts, see *Glover's Case*, 109 Mass. 340.

In South Carolina it is at the discretion of the court to continue a cause on the part of the state.—*State v. Patterson*, 1 McC. L. (S. C.) 177.

Where a trial for a capital crime, in Massachusetts, had been continued one term and the government was not then prepared, the court, on continuing it further, took the prisoner's single

recognizance for his appearance at the next term.—*Com. v. Phillips*, 16 Mass. 426.

But where, at the first term after the finding of a capital indictment, it appeared that a material witness on the part of the government, duly put under recognizance to appear, had fraudulently avoided the court, though without any connivance of the prisoner, the indictment was continued.—*Com. v. Carter*, 28 Mass. (11 Pick.) 277.

² *Supra*, § 1379.

1. On affidavit setting forth the fact that a material witness is absent, that his presence will be procured by the next court, and that due diligence has been used to obtain his attendance.

2. On affidavit setting forth the inability of the defendant, and in certain extreme cases, of his counsel, to attend the trial.

3. On affidavit, showing that means had been improperly taken to influence the jury and the public at large, so as to prevent, at the time in question, the chance of an impartial trial.

Continuing as to one defendant does not involve continuing as to others, when the trial may be several.¹

1. *Absence of Material Witness.*

§ 1518. SUCH ABSENCE GROUND FOR CONTINUANCE IF DUE DILIGENCE HAS BEEN SHOWN. The general rule is, that a continuance will be granted on an affidavit setting forth the absence of a material witness for the defense, and alleging that his attendance will be procured at the next court, and that due diligence has been used in attempting to procure his attendance.¹

¹ White v. State, 31 Ind. 262. See State v. Ford, 37 La. Ann. 444.

¹ GA.—Whitley v. State, 38 Ga. 50. IND.—See Kennedy v. State, 81 Ind. 379. KAN.—State v. Burwell, 34 Kan. 312, 8 Pac. 470. KY.—Morgan v. Com., 77 Ky. (14 Bush) 106. MO.—State v. Wood, 68 Mo. 444. TENN.—Jones v. State, 78 Tenn. (10 Lea) 585. TEX.—Ratliff v. State, 12 Tex. App. 330.

In England a trial for murder was put off until the next assizes, upon an application on the part of the prosecution, on the ground of the inability of a material witness

to attend, although the witness was not examined before the magistrates, there being an affidavit of a medical man as to an injury to the witness, rendering it, in his opinion, unsafe that he should travel, and this even after the trial had been appointed for a particular day.—R. v. Lawrence, 4 F. & F. 901.

And so it has been held that the court will postpone until the next assizes the trial of a prisoner charged with murder, on an affidavit by his mother that she would be enabled to prove by several witnesses that he was of unsound mind, and that she and her family

§ 1519. — AND SO ON UNAUTHORIZED WITHDRAWAL OF WITNESS. Where a party is surprised by the unauthorized withdrawal of his witnesses after the trial has commenced, the practice is to apply for a continuance or postponement of the trial; and should the court unadvisedly refuse the application, such refusal may be made the ground of application for a new trial.¹

There are, however, the following qualifications to the rule admitting continuance on the ground of absence of witnesses:

§ 1520. CONTINUANCE NOT GRANTED WHEN WITNESS IS OUT OF PROCESS OF COURT, OR OF UNCERTAIN ATTENDANCE. A continuance will not be granted, where the absent testimony is out of the process of the court.¹ Thus it was held by Story, J., in a leading case, not to be a sufficient ground for a delay of trial that the party wishes it in order to procure papers from a foreign country, since the court could not issue process which will be effectual in procuring such papers.² But in a strong case, and when there is a reasonable ground for expecting to receive the testimony, a continuance will be granted to secure such foreign testimony, if it be admissible.³

There must, in any case, in order to sustain the motion,

were in extreme poverty, and had been unable to procure the means to produce such witnesses, and that she had reason to believe that if time were given her the requisite funds would be provided.—R. v. Langhurst, 10 Cox C. C. 353, 4 F. & F. 969.

¹ Cotton v. State, 4 Tex. 260. See Lynes v. State, 46 Ga. 208.

² CAL.—People v. Cleveland, 49 Cal. 578. MASS.—Com. v. Millard, 1 Mass. 6. N. J.—State v. Zellers, 7 N. J. L. (2 Halst.) 220. S. C.—State v. Files, 3 Brev. 304, 1 Const.

R. 234. TEX.—Guoganden v. State, 41 Tex. 626. VA.—Mull's Case, 49 Va. (8 Gratt.) 695.

² S. C.—State v. Lewis, 1 Bay L. 1; State v. Files, 3 Brev. L. 304. VA.—Hurd v. Com., 32 Va. (5 Leigh) 715; Mull's Case, 49 Va. (8 Gratt.) 695. FED.—United States v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15204. ENG.—R. v. D'Eon, 1 W. Bl. 510, 96 Eng. Repr. 295. See, *infra*, § 1522.

³ McDermott v. State, 89 Ind. 187; White v. Com., 80 Ky. 480; State v. Klinger, 43 Mo. 127.

be a reasonable prospect of obtaining the attendance of the witness at the period asked for.⁴

§ 1521. — NOT GRANTED WHEN THERE HAVE BEEN LACHES. A continuance will not be granted on such an affidavit when the prisoner has been guilty of laches or delay,¹ or of any connivance.² Thus in a case in the Court of Errors of Virginia, it was held that where, after one continuance obtained by the prisoner, who was charged with uttering a forged note, he asked for another, the court below was right in compelling him to disclose what the absent witness would prove; and was justified in refusing the continuance, though the witness was shown to be material, due diligence not having been used to procure his attendance.³ And where a continuance was asked on account of the absence of witnesses, but the evidence of one of them, according to the affidavit, would have been entitled to but little influence, and the others were merely to impeach the principal witness for the prosecution, the case having been continued before, and it not appearing why the witnesses were not attached, nor that they would

⁴ *People v. Lewis*, 64 Cal. 401, 1 Pac. 490.

¹ 8 East 37; 1 Blackston 514. CAL.—*People v. Jocelyn*, 29 Cal. 562. FLA.—*Gladden v. State*, 12 Fla. 562. GA.—*Brown v. State*, 65 Ga. 332. IND.—*Anderson v. State*, 28 Ind. 22. KY.—*Earp v. Com.*, 39 Ky. (c Dana) 302. LA.—*State v. Taylor*, 11 La. 709. MASS.—*Com. v. Millard*, 1 Mass. 9. MISS.—*Gibson v. State*, 59 Miss. 341; *Fletcher v. State*, 60 Miss. 675; *Thomas v. State*, 61 Miss. 60. MO.—*State v. Burns*, 54 Mo. 274; *State v. Simms*, 68 Mo. 305. PA.—*Com. v. Gross*, 1 Ashm. 281. TEX.—*Coward v. State*, 6 Tex.

App. 59; *Cardova v. State*, 6 Tex. App. 445; *Gaston v. State*, 11 Tex. App. 143; *Evans v. State*, 13 Tex. App. 225; *Walker v. State*, 13 Tex. App. 618; *Mapes v. State*, 14 Tex. App. 129; *Hart v. State*, 14 Tex. App. 657; *O'Neal v. State*, 14 Tex. App. 582. VA.—*Holt v. Com.*, 4 Va. (2 Va. Cas.) 156; *Bledsoe v. Com.*, 27 Va. (6 Rand.) 673; *Flott v. Com.*, 53 Va. (12 Gratt.) 564; *Rousell's Case*, 69 Va. (28 Gratt.) 930. WIS.—*Dingman v. State*, 48 Wis. 485, 4 N. W. 668.

² *Wormley v. Com.*, 51 Va. (10 Gratt.) 658.

³ *Holt v. Com.*, 4 Va. (2 Va. Cas.) 156.

attend at the next term, it was held that the application was properly refused.⁴

§ 1522. — OR UNLESS THERE WAS DUE DILIGENCE. The affidavit must itself show due diligence in summoning the absent witnesses,¹ or good grounds for expecting their attendance at a future court.² Thus where a prisoner indicted for felony made affidavit that he had four material witnesses who were absent, and resident in another state, without naming them, or stating that he had made any effort to procure their attendance, or that he expected to be able to procure their attendance, and thereupon prayed a continuance, it was held the motion for a continuance was properly overruled.³ The court may examine the party as to the grounds of his affidavit.⁴

§ 1523. — NOT GRANTED WHEN TESTIMONY IS IMMATERIAL. A continuance will not be granted on such an affidavit, where, on the court's requiring such particularity (which, at least when the application is made for the second time, it is usual for it to do),¹ it appears on the face of the defendant's application that the object for which the absent witness is to be called is not material² to

⁴ Earp v. Com., 39 Ky. (9 Dana) 302. See Holden v. State, 13 Tex. App. 601.

¹ CAL.—People v. Lampson, 70 Cal. 204, 11 Pac. 593. IND.—McDermott v. State, 89 Ind. 187. MO.—State v. Fox, 79 Mo. 109. TENN.—See Taylor v. State, 79 Tenn. (11 Lea) 708; Davis v. State, 85 Tenn. 522, 3 S. W. 348. TEX.—Atkins v. State, 11 Tex. App. 8; Pullen v. State, 11 Tex. App. 89.

² State v. Whitton, 68 Mo. 91; Murray v. State, 1 Tex. App. 417; Strickland v. State, 13 Tex. App. 364, and cases cited to last section. See, also, Mapes v. State, 14 Tex. App. 129; O'Neal v. State, 14 Tex. App. 582.

³ Hurd v. Com., 32 Va. (5 Leigh) 715.

⁴ State v. Betsall, 11 W. Va. 703.

¹ Nelson v. State, 32 Tenn. (2 Swan) 482.

² CAL.—People v. Thompson, 4 Cal. 238. GA.—Dacy v. State, 17 Ga. 439. ILL.—Steel v. People, 45 Ill. 152. KY.—Earp v. Com., 39 Ky. (9 Dana) 302. MISS.—Jones v. State, 60 Miss. 117. MO.—State v. Pagles, 92 Mo. 300, 4 S. W. 931. S. C.—State v. Files, 3 Brev. L. 304. TENN.—Davis v. State, 85 Tenn. 522, 3 S. W. 348. TEX.—Bruton v. State, 21 Tex. 337; Pinckford v. State, 13 Tex. App. 468; Nolan v. State, 14 Tex. App. 474, 46 Am. Rep. 247; Phelps v.

the issue, or would not, if granted, have an appreciable effect.³

§ 1524. **AFFIDAVIT MUST BE SPECIAL.** The affidavit must be sworn a sufficient period before trial, to give notice to the opposite side, unless the facts affecting the witness were not known in time, when it may be sworn in court, and from the proof offered the judge will decide if the witness is material.¹ The affidavit must, as a rule, be made by the party on whose behalf the postponement is sought; but his absence, age, sickness, or other sufficient cause will let in his attorney, or even a third person, to swear it.² The illness of the absent witness, or of a child of which she is the nursing mother, is best established by the affidavit of the medical attendant. The name and place of abode of the expected witness, his continued absence or actual incapacity to attend at any time during the session, and the use of every reasonable effort to compel such attendance, must be distinctly specified, and the materiality of his evidence in the case shown.³ Nor will these facts suffice to postpone the trial, unless the affidavit is positive in its verification of them.⁴ Thus, it must state that the absent person is a material witness, without whose evidence the applicant can not safely pro-

State, 15 Tex. App. 45; Irvine v. State, 20 Tex. App. 12; Henning v. State, 24 Tex. App. 315, 6 S. W. 137. VA.—Bledsoe v. Com., 27 Va. (6 Rand.) 673; Hurd v. Com., 32 Va. (5 Leigh) 715.

Failure to put witness on stand, who was present at the trial, accused not entitled to new trial for failure of court to continue cause. —Areola v. State, 30 Tex. Cr. Rep. 51, 48 S. W. 195.

³ Varnadoe v. State, 67 Ga. 768; People v. Anderson, 53 Mich. 60; Allison v. State, 14 Tex. App. 402.

¹ Adams v. People, 109 Ill. 444, Crim. Proc.—125

50 Am. Rep. 617; Dunn v. People, 109 Ill. 635.

² Moody v. People, 20 Ill. 315.

Compare: R. v. Langhurst, 10 Cox C. C. 353, 4 F. & F. 969, where the affidavit of the attorney was refused.

³ ILL.—Moody v. People, 20 Ill. 315; Crews v. People, 120 Ill. 317, 11 N. E. 404. IND.—Beavers v. State, 58 Ind. 530. MO.—State v. Underwood, 76 Mo. 630. NEB.—Comstock v. State, 14 Neb. 205, 15 N. W. 355; Polin v. State, 14 Neb. 540, 16 N. W. 898.

⁴ See Pullen v. State, 11 Tex. App. 89.

ceed to trial, and that he has endeavored, without effect, to serve on him a subpoena; specifying the exertions used. It should then state in plain terms that there is reasonable ground for believing that the delay sought for will tend to the furtherance of justice, and that the testimony of the witness may be obtained at the time to which the trial is proposed to be deferred.⁵ Unless there be such exactness, a continuance will not be granted.⁶ In proper cases, counter-affidavits may be presented.⁷

§ 1525. IMPEACHING WITNESSES, AND WITNESSES TO CHARACTER, NOT GENERALLY "MATERIAL." Unless there be auxiliary grounds, a continuance will not be granted on account of the absence of impeaching witnesses. Thus, where it appeared that two witnesses out of three, on the ground of whose absence a continuance was asked, were merely to impeach the chief witnesses for the prosecution, and that the third was immaterial, a continuance was refused.¹ On account of the absence of witnesses to character, a continuance will rarely be granted.² A fortiori the continuance will be refused in such case where the prosecution admits that to which the absent witness is to testify. Thus, where in a New York case it was proved on the part of the government, and was not disputed by the accused, that no living person save the prisoner was present at the alleged murder, nor was there claim of

⁵ Dick. Q. S., 6th ed., 469; Foster 40; 1 Wheel. C. C. 30; Com. v. Fuller, 2 Wheel. Cr. Cas. (N. Y.) 323; Holt v. Com., 4 Va. (2 Va. Cas.) 156; Mull's Case, 49 Va. (8 Gratt.) 695.

As to requisites of affidavit, see People v. Francis, 38 Cal. 183; People v. McCrory, 41 Cal. 458; Jim v. State, 15 Ga. 535; Cutler v. State, 42 Ind. 44; Miller v. State, 42 Ind. 544; State v. Lange, 59 Mo. 418.

⁶ Williams v. State, 10 Tex. App. 114; People v. Garns, 2 Utah 260

⁷ See Johnson v. State, 65 Ga. 74; State v. Williams, 69 Ga. 11; State v. Simien, 30 La. Ann. (pt. I) 296.

¹ Earp v. Com., 39 Ky. (9 Dana) 302.

² State v. Klinger, 43 Mo. 127; Rhea v. State, 18 Tenn. (10 Yerg.) 258; R. v. Jones, 8 East 31, 34, Lawrence, J., 9 Rev. Rep. 368.

Contra: State v. Nash, 7 Iowa 347.

an alibi, and it appeared by the affidavits that the absent witnesses were expected to testify to the defendant's good character before the alleged murder, which the prosecution admitted; the motion was denied.³

§ 1526. IF OBJECT BE DELAY, REASON CEASES. It is in the discretion of the court, even where the materiality of the absent evidence is exposed on affidavit, to refuse a continuance, if it should appear that the defendant's sole object was delay.¹

§ 1527. REFUSAL CURED BY SUBSEQUENT EXAMINATION OF WITNESS. Refusal by the court to continue a capital trial because of a witness's absence, on the ground of want of diligence on the part of the defendant, is, whether erroneous or not, no ground for a new trial, if the witness was brought in and testified before the end of the trial.¹

§ 1528. USUALLY CONTINUANCE IS REFUSED WHEN OPPOSITE PARTY CONCEDES FACTS. A continuance, according to the general practice, may be refused, if the adverse party will admit that such witness would testify as is supposed by the party moving for a continuance.¹ It has, however, been said that it is not sufficient that the opposite party should admit that the witness would have testified to the specific facts; there must be an admission that those facts are absolutely true.² But the better view is that contradictory evidence may be introduced by a party who has

³ *People v. Wilson*, 3 Park. Cr. Rep. (N. Y.) 199.

¹ *People v. Thompson*, 4 Cal. 238; *State v. Duncan*, 28 N. C. (6 Ired. L.) 98; *Vance v. Com.*, 4 Va. (2 Va. Cas.) 162; *Bledsoe v. People*, 27 Va. (6 Rand.) 674.

¹ *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493.

¹ CAL.—*People v. Brown*, 59 Cal. 345. GA.—*Wise v. State*, 34 Ga.

348. ILL.—*Van Meter v. People*, 60 Ill. 168. MISS.—*Browning v. State*, 33 Miss. 48. N. Y.—*People v. Wilson*, 3 Park. Cr. Rep. 199.

Missouri statute making this obligatory is unconstitutional.—*State v. Hickman*, 75 Mo. 416; *State v. Berkeley*, 92 Mo. 41.

² See *People v. Vermilyea*, 7 Cow. (N. Y.) 369; *Brill v. Lord*, 14 Johns. (N. Y.) 341; but see cases in last note.

admitted statements made in an affidavit for continuance, and that the same questions of competency may be raised as would be allowed if the witness were sworn in court.³ Such an admission is a waiver of the defendant's constitutional right to hear the witnesses produced against him.⁴ Circumstances, however, may exist, when, upon the defendant making an affidavit for a continuance, it will be held that the prosecution can not force him into a trial by admitting the truth of what the alleged absent witness would depose to, such witness being attainable at a future trial.⁵ And in any view the admission must be as broad as the offer.⁶

§ 1529. NOT GRANTED WHEN WITNESS HAD NOTICE, UNLESS HE SECRETES HIMSELF. A continuance will not be granted on such an affidavit, where it appears that the absent witness had notice of the time of trial, and was duly summoned, unless he had secreted himself, or had been spirited away by the opposite party.¹

³ State v. Geddis, 42 Iowa 164; Olds v. Com., 10 Ky. (3 A. K. Marsh.) 467.

Witness turning up he may be examined, notwithstanding the agreement to take his testimony as offered in advance.—Hackett v. State, 13 Tex. App. 406.

⁴ State v. Wagner, 78 Mo. 644, 47 Am. Rep. 131; Hancock v. State, 14 Tex. App. 392.

As to waiver by accused of right to be confronted by witnesses, see: IND.—Shular v. State, 105 Ind. 289, 55 Am. Rep. 211, 4 N. E. 370. MO.—Merrill v. St. Louis (City of), 83 Mo. 244, 53 Am. Rep. 576; State v. Lynn, 169 Mo. 664, 70 S. W. 127; State v. Nave, 185 Mo. 125, 84 S. W. 1; State v. Williford, 111 Mo. App. 668, 86 S. W. 570. MONT.—State v. Va-

nella, 40 Mont. 326, 106 Pac. 364. ORE.—State v. Bowker, 26 Ore. 309, 38 Pac. 124. UTAH—State v. Mortensen, 26 Utah 312, 73 Pac. 562. WASH.—State v. Lewis, 31 Wash. 75, 71 Pac. 778.

Waiving right to be present at taking of depositions.—State v. Vanella, 40 Mont. 326, 106 Pac. 364.

⁵ People v. Dodge, 28 Cal. 445; Wassels v. State, 26 Ind. 30; Goodman v. State, 19 Tenn. (Meigs) 195; State v. Baker, 81 Tenn. (13 Lea) 326; De Warren v. State, 29 Tex. 464.

Aliter where witness is out of jurisdiction.—Petty v. State, 72 Tenn. (4 Lea) 328.

⁶ People v. Brown, 54 Cal. 243.

¹ Barnes 442.

2. *Inability of Defendant or His Counsel to Attend.*

§ 1530. INABILITY TO ATTEND MAY BE A GROUND FOR CONTINUANCE. On affidavit setting forth the inability of the defendant,¹ and in certain extreme cases, e. g., sickness,² of his counsel, to attend the trial, the motion may be granted,³ and the same indulgence will be granted when the defendant has been suddenly and without notice abandoned by his counsel, so that he can not properly prepare for trial.⁴ Death or sickness of counsel, occurring so suddenly as to prevent the engagement of others, is generally good ground;⁵ but mere absence of counsel is rarely received as in itself adequate,⁶ and this is eminently the case when the absent counsel is one of two or more employed.⁷ Certainly such excuse can not be made available more than once in the same case.⁸

3. *Improper Means to Prejudice Cause or Surprise.*

§ 1531. CONTINUANCE GRANTED WHEN THERE HAS BEEN UNDUE PREJUDICE OF CAUSE—AND SO OF SURPRISE. A continuance may also be granted on affidavit showing that means had been improperly taken to influence the jury and the public at large, so as to prevent, at that time, an

¹ See *Hays v. State*, 68 Ga. 833.

² *People v. Logan*, 4 Cal. 188, 60 Am. Dec. 604; *Loyd v. State*, 45 Ga. 57; *Brown v. State*, 38 Tex. 482.

Compare: *Harvey v. State*, 67 Ga. 639; *State v. Stegner*, 72 Iowa 13, 33 N. W. 340.

Sickness of prosecuting officer is ground for continuance.—*People v. Shufelt*, 61 Mich. 237, 28 N. W. 79.

³ *Haley v. Grant*, 1 Say. 63, 96 Eng. Repr. 804.

⁴ *Wray v. People*, 78 Ill. 212.

⁵ *Hunter v. Fairfax*, 3 U. S. (3 Dall.) 305, 1 L. Ed. 613.

⁶ *M'Kay v. Ins. Co.*, 2 Cal. (N. Y.) 384; *Hammond v. Haws*, 1 Wall. Sr. 1, Fed. Cas. No. 6002.

Compare: *Roberts v. State*, 9 Colo. 458, 13 Pac. 630; *Long v. State*, 38 Ga. 49; *State v. Ferris*, 16 La. Ann. 424; *Rhode Island v. Massachusetts*, 36 U. S. (11 Pet.) 226, 9 L. Ed. 697.

⁷ *Turner v. State*, 70 Ga. 769; *Walker v. State*, 13 Tex. App. 618.

⁸ *State v. Dubois*, 24 La. Ann. 309.

impartial trial,¹ and that the public excitement was such as to intimidate and swerve the jury.² But the fact of ordinary newspaper paragraphs existing on the subject is not enough.³ Where the excitement is the result of the defendant's own action, the application will be refused;⁴ and it is not a good ground for a new trial, that at the time of trial there was a great excitement in the public mind against the accused.⁵ A continuance also may be granted in cases of nonculpable surprise.⁶

§ 1532. TREACHERY OF COUNSEL. A continuance, also, may be granted when by the treachery or misconduct of counsel, due preparation for trial is prevented.¹

4. *Inability of Witness to Understand the Obligation of an Oath.*

§ 1533. IN SUCH CASE CONTINUANCE MAY BE GRANTED. A continuance, also, will sometimes be granted where a witness, whose evidence is material to the case, has no sense of the obligation of an oath; in such a case, the trial may be adjourned until the witness is instructed in the principles of moral duty.¹

5. *Pendency of Civil Proceedings.*

§ 1534. AS GROUND FOR CONTINUANCE. The court will not continue a prosecution because a civil suit is pending when the prosecution is the proper remedy for the wrong.¹ It is otherwise, however, when the prosecutor resorts to

¹ R. v. Gray, 1 Bur. 510, 97 Eng. Repr. 424.

² Com. v. Dunham, Thatch. Cr. Cas. (Mass.) 516.

³ Com. v. Carson, Mayor's Court of Philadelphia, June, 1823, per Reed, Recorder, 1 Wheel. C. C. 488.

⁴ United States v. Porter, 1 Bald. 78, Fed. Cas. No. 16730.

⁵ Infra, § 1830. See State v. Ford, 37 La. Ann. 444.

⁶ Lutton v. State, 14 Tex. App. 518.

¹ State v. Lewis, 74 Mo. 222; infra, § 1819.

¹¹ Leach's Cases 430. See 1 Whart. Crim. Ev. (Hilton's ed.), §§ 366, 370.

¹ Drake v. Lowell, 54 Mass. (13 Met.) 292; see Foster v. Com., 8 Watts & S. (Pa.) 77; Taylor v. Com., 70 Va. (29 Gratt.) 780; supra, § 1383.

civil proceedings as a means of redress for which they are peculiarly suited.²

III. NEW TRIAL.

§ 1535. FOR REFUSAL TO GIVE CONTINUANCE NEW TRIAL MAY BE GRANTED. If, on a motion for new trial, the court is convinced, after hearing all of the evidence, that the continuance should have been allowed, the motion should be granted,¹ and if it be refused, the party excepting may, in those jurisdictions where a bill of exceptions lies in such cases, obtain, in a strong case, a revision in error.²

IV. QUESTION IN ERROR.

§ 1536. REFUSAL TO CONTINUE NOT USUALLY SUBJECT OF ERROR. As a general rule, error does not lie to the action of the court on a motion for continuance, which is in the discretion of the court;¹ though when a bill of exceptions is taken, the decision, in a strong case, may be reviewed.²

² Com. v. Bliss, 1 Mass. 32; Com. v. Elliot, 2 Mass. 372; Respublica v. Gross, 2 Yeates (Pa.) 479; Com. v. Dickinson, 3 Clark (Pa.) 365; Com. v. Dickerson, 7 W. N. C. (Pa.) 433; R. v. Feilding, 2 Burr. 719, 97 Eng. Repr. 531; R. v. Simmons, 8 Car. & P. 50, 34 Eng. C. L. 603; supra, § 1383.

Compare: Richardson v. Luntz, 26 La. Ann. 313; State v. Wilson, 33 La. Ann. 261; Buckner v. Beek, Dud. L. (S. C.) 168; 1 Kerr's Whart. Crim. Law, § 814.

¹ See cases cited infra, § 1730, and in next note, and see Heath v. State, 68 Ga. 287.

² Infra, §§ 1711, 1823, 1824. See Malone v. State, 49 Ga. 212; Moody v. State, 54 Ga. 660; McDaniel v. State, 16 Miss. (8 Smed. & M.) 401, 47 Am. Dec. 93; Jones v. State, 78 Tenn. (10 Lea) 585.

¹ Infra, §§ 1711, 1824. ALA.—De Arman v. State, 77 Ala. 10. ARK.—Edmonds v. State, 34 Ark. 720. FLA.—Morgan v. State, 13 Fla. 671. GA.—Cox v. State, 64 Ga. 374, 37 Am. Rep. 76. LA.—State v. Wilson, 23 La. Ann. 558; State v. Chevalier, 36 La. Ann. 81. MASS.—Com. v. Donovan, 99 Mass. 425, 96 Am. Dec. 765. MISS.—Strauss v. State, 58 Miss. 53; Jones v. State, 60 Miss. 117. MO.—State v. Shreve, 39 Mo. 90; State v. Lewis, 74 Mo. 222. N. Y.—Eighmy v. People, 79 N. Y. 546; Webster v. People, 92 N. Y. 422, 1 N. Y. Cr. Rep. 190. S. C.—State v. Dodson, 16 S. C. 453. TEX.—Eldridge v. State, 12 Tex. App. 208.

² FLA.—Barber v. State, 13 Fla. 675. GA.—Long v. State, 38 Ga. 491; Whitely v. State, 38 Ga. 50;

V. CHANGE OF VENUE.

§ 1537. ON DUE CAUSE VENUE MAY BE CHANGED. In some jurisdictions at common law, in others by local statute, the venue of a case may be changed on the defendant's application,¹ at the discretion of the court, on due cause shown.² The application is too late when made after empanelling the jury,³ and the burden is on the petitioner to make out a case.⁴ If the ground laid be incapacity of the judge, it has been ruled the court has no discretion,

Monday v. State, 32 Ga. 672, 79 Am. Dec. 314; Brown v. State, 65 Ga. 332; Williams v. State, 69 Ga. 11. IND.—Wassels v. State, 26 Ind. 30; Hurt v. State, 26 Ind. 106; Sturm v. State, 74 Ind. 335. IOWA—State v. Rorabacher, 19 Iowa 154; State v. Painter, 40 Iowa 298. KY.—Salisbury v. State, 79 Ky. 425. LA.—State v. Moultrie, 33 La. Ann. 1146; State v. Horton, 33 La. Ann. 289; State v. Briggs, 34 La. Ann. 69; State v. Boyd, 37 La. Ann. 81. N. C.—State v. Scott, 78 N. C. 465. OHIO—Johnson v. State, 42 Ohio St. 207. TEX.—Williams v. State, 10 Tex. App. 523; Garrold v. State, 11 Tex. App. 219; Bohannon v. State, 14 Tex. App. 271. VA.—Taylor v. Com., 77 Va. 692.

See, also, *infra*, § 1704.

¹ See *State v. Green*, 22 W. Va. 800.

² 1 Chitty Cr. L. 201. ALA.—Williams v. State, 48 Ala. 85; Taylor v. State, 48 Ala. 180; Holton, *Ex parte*, 69 Ala. 164. ARK.—McPherson v. State, 29 Ark. 225; Burris v. State, 38 Ark. 221. CAL.—People v. Congleton, 44 Cal. 92; People v. Perdue, 49 Cal. 425. GA.—Brinkley v. State, 54 Ga. 371.

ILL.—Dunn v. People, 109 Ill. 635. IND.—Manly v. State, 52 Ind. 215; Bissot v. State, 53 Ind. 408; Leslie v. State, 83 Ind. 180; Shular v. State, 105 Ind. 290, 55 Am. Rep. 211, 4 N. E. 870. IOWA—State v. Spurbeck, 44 Iowa 667. KAN.—State v. Bohan, 15 Kan. 407; State v. Adams, 20 Kan. 311. LA.—State v. Ford, 37 La. Ann. 443. MD.—Davis v. State, 39 Md. 355. MO.—State v. O'Rourke, 55 Mo. 440; State v. Shipman, 63 Mo. 147; State v. Lawthew, 65 Mo. 454; State v. Burgess, 68 Mo. 334; State v. Hayes, 14 Mo. App. 173. N. Y.—People v. Harris, 4 Den. 150; People v. Webb, 1 Hill 179. S. C.—State v. Coleman, 8 S. C. 237. TENN.—Hopkins v. State, 78 Tenn. (10 Lea) 204. TEX.—Anshicks v. State, 45 Tex. 148; Labbaite v. State, 6 Tex. App. 257; Davis v. State, 19 Tex. App. 201. WIS.—Martin v. State, 35 Wis. 294; State v. Rowan, 35 Wis. 303. ENG.—R. v. Cowle, 2 Burr. 834, 97 Eng. Repr. 587; R. v. Hunt, 3 Barn. & Ald. 444, 5 Eng. C. L. 295; R. v. Holden, 5 Barn. & Ad. 347, 27 Eng. C. L. 151.

³ People v. Cotta, 49 Cal. 169.

⁴ People v. Sammis, 3 Hun (N. Y.) 560.

and that the application must be granted;⁵ though this view must be limited to cases where such incapacity is established.⁶ The ground for a change should be fully spread on the record, so that it can be examined by a court of error;⁷ and that facts must be set forth showing that the party could not have a fair trial in the district or town in which the arraignment is proposed.⁸ The arraignment once made, in the place where the indictment is found, need not be repeated in the place to which the trial is removed,⁹ though a double arraignment would not be error.¹⁰ Venue may be changed as to one of several defendants, leaving the others to be tried in the place of the finding of the bill.¹¹ With regard to the constitutional questions involved, it may be noticed that the

⁵ IND.—*Mershon v. State*, 44 Ind. 598. IOWA—*People v. Reed*, 49 Iowa 85; *State v. Foley*, 65 Iowa 51, 21 N. W. 162. MINN.—*Curtis*, Ex parte, 3 Minn. 274. MO.—*State v. Gates*, 20 Mo. 400 (a case where the judge had been counsel).

See, infra, § 1538.

⁶ *People v. Shuler*, 28 Cal. 490.

⁷ *State v. Barrett*, 8 Iowa 536; *Emporia v. Volmer*, 12 Kan. 622; see *State v. Daniels*, 66 Mo. 103; *Poe v. State*, 78 Tenn. (10 Lea) 673; *Wormeley v. Com.*, 51 Va. (10 Gratt.) 658.

No reversal if substantial justice is done.—*Posey v. State*, 73 Ala. 490; *Magee v. State*, 14 Tex. App. 367.

⁸ *People v. Graham*, 21 Cal. 261; *People v. Bodine*, 7 Hill (N. Y.) 147; *State v. Williams*, 2 McC. L. (S. C.) 302; *Wormeley v. Com.*, 57 Va. (10 Gratt.) 658; *R. v. Holden*, 5 Barn. & Ad. 347, 27 Eng. C. L. 151.

As refusing change of venue on

statutory grounds, see *State v. Howard*, 31 Vt. 414.

Right to change of venue is not absolute.—See *Dulany v. State*, 45 Md. 100.

As to its limitations, see *State v. Flynn*, 31 Ark. 35.

After change on his petition, defendant can not object to jurisdiction.—See *Perteet v. People*, 70 Ill. 71.

In Illinois the petitioner has a statutory right to the change, on making the prescribed affidavit.—*Brennan v. People*, 15 Ill. 511.

⁹ *Paris v. State*, 36 Ala. 232; *Hayes v. State*, 58 Ga. 35; *Price v. State*, 8 Gill (Md.) 295; *Davis v. State*, 39 Md. 355; *Vance v. Com.*, 4 Va. (2 Va. Cas.) 162.

¹⁰ *Gardner v. People*, 4 Ill. (3 Scam.) 83. See, infra, §§ 1634 et seq.

¹¹ *State v. Carothers*, 1 G. Greene (Iowa) 464; *State v. Wetherford*, 25 Mo. 439; *State v. Martin*, 24 N. C. (2 Ired. L.) 101.

Compare: *People v. Baker*, 8 Park. Cr. Rep. (N. Y.) 181.

provision, as it exists in most constitutions, that the defendant is to be tried by an "impartial jury of the vicinage," would forbid, if the term "vicinage" be regarded as imperative, any trial when no impartial jury of the vicinage is to be found. The term "vicinage," therefore, is to be regarded as indicatory rather than mandatory; and it is the vicinage of the place of the offense rather than that of the corporeal position of the offender.¹² And even where the guarantee is specifically given, it can be waived.¹³

A trial court may be compelled by mandamus from an appellate court to try a case removed to it on change of venue.¹⁴

In determining whether a judge of a United States district court is to remove a criminal trial from one district to another, he must exercise a sound discretion in view of the whole case, this being a question of discretion.¹⁵

¹² See 1 Kerr's Whart. Crim. Law, § 330, note.

As to Texas practice, see Cox, *Ex parte*, 12 Tex. App. 605; Hoffman v. State, 12 Tex. App. 406.

As to federal statute, see Burkhardt, *In re*, 33 Fed. 25.

¹³ See *Gut v. State*, 76 U. S. (9 Wall.) 35, 19 L. Ed. 573; *infra*, § 1668.

¹⁴ *People v. Lane*, 105 Ill. 662.

¹⁵ *State v. Perigo*, 70 Iowa 657, 28 N. W. 452; *Wolf, In re*, 27 Fed. 606.

CHAPTER XCL

CHALLENGES.

I. CHALLENGES TO COURT.

§ 1538. Judges not open to challenge.

II. CHALLENGES TO JURY.

§ 1539. In general.

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§ 1561. — And so in Maine.

§ 1562. — And so in New Hampshire.

§ 1563. In Vermont prior expression of opinion disqualifies.

§ 1564. In Massachusetts prejudice must go to particular issue.

§ 1565. — So in Connecticut.

§ 1566. In New York, at common law, opinion, but not impression, disqualifies.

§ 1567. — But by statute no disqualification of witness not under bias.

§ 1568. In New Jersey, hypothesis does not exclude.

§ 1569. In Pennsylvania, opinion, but not impression, disqualifies.

§ 1570. — So in Delaware and Maryland.

§ 1571. — So in Virginia.

§ 1572. — So in North and South Carolina.

§ 1573. — So in Ohio.

§ 1574. — So in Alabama.

§ 1575. — So in Mississippi.

§ 1576. — So in Missouri.

§ 1577. — So in Tennessee.

§ 1578. — So in Indiana.

§ 1579. — So in Illinois.

§ 1580. — So in Arkansas.

§ 1581. — So in Georgia.

§ 1582. — So in Iowa.

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- § 1590. — Must first be sworn on voir dire.
- § 1591. Court may ask questions not statutory.
- § 1592. Only party prejudiced may challenge.
- § 1593. Juror may be examined as to details.
- § 1594. Bias must go to immediate issue.
- § 1595. Relationship and business association cause for challenge.
- § 1596. — And so of prior connection with cause.
- § 1597. — And so of participation in cognate offense.
- § 1598. — And so of pecuniary interest in result.
- § 1599. — And so of irreligion, infamy, and incapacity.
- § 1600. — And so of conscientious scruples as to capital punishment.
- § 1601. — And so of other conscientious scruples.
- § 1602. — And so of belief that statute is unconstitutional.
- § 1603. "Free-masonry" does not exclude.
- § 1604. Membership of specific "vigilance" associations, or prospective organizations, may disqualify, but not of general association to put down crime.

iii. *Alienage, Non-residence, or Ignorance of Language.*

- § 1605. Alienage, non-residence, ignorance of language, and drunkenness.

e. *Challenges to Polls for Favor.*

- § 1606. Challenges for favor are those involving disputed questions of fact.
- § 1607. Challenges can not moot questions of mere personal privileges of juror.

III. MODE AND TIME OF TAKING CHALLENGE.

- § 1608. Challenge must be prior to oath.
- § 1609. When for favor must specify reasons.
- § 1610. Juror to be sworn on voir dire.
- § 1611. Passing over to court no waiver.
- § 1612. After principal challenge is disallowed, there may be challenge for favor.
- § 1613. Peremptory challenge may be made after challenge for cause.
- § 1614. Challenge may be made by counsel.
- § 1615. In cases of surprise, peremptory challenge may be recalled.
- § 1616. One defendant can not object to challenge of co-defendant.
- § 1617. Juror passed by one side may be challenged by other.
- § 1618. Juror may be cross-examined and contradicted.
- § 1619. Court may of its own motion examine and excuse.

IV. HOW CHALLENGES ARE TO BE TRIED.

- § 1620. At common law, at discretion of court.
- § 1621. As to array, triers are appointed on issues of fact; otherwise when there is demurrer.
- § 1622. At common law, on challenges to the polls, triers are appointed by court.
- § 1623. No challenge to triers.
- § 1624. When triers are not asked for, parties are bound by decision of court.
- § 1625. All evidence tending to show bias is admissible on trial.
- § 1626. — But bias must be shown to set aside juror.

V. JUROR'S PERSONAL PRIVILEGE NOT GROUND FOR CHALLENGE.

- § 1627. In general.

VI. REVISION BY APPELLATE COURT.

- § 1628. Defendant not exhausting peremptory challenges can not except in error to overruling challenge to favor.

§ 1629. — Otherwise where he has exhausted his personal challenges.

§ 1630. Error lies when challenge is on record.

I. CHALLENGES TO COURT.

§ 1538. JUDGES NOT OPEN TO CHALLENGE. The Roman common law extends the right of challenge for cause—no peremptory challenges being allowed—to the judge as well as to the juror; and the great inclination of authority is that the causes which disqualify the one disqualify the other.¹ Where the judge, like the chancellor, sits to try both facts and law, as is the case with the civilians, there is peculiar reason for the application to him of a jealous test; and the cases where he may be challenged are placed in two classes: (1) Where he is disqualified by circumstances beyond his control; e. g., relationship or previous connection with the subject-matter. (2) Where he is disqualified by misconduct; e. g., partiality or prejudice.² But by the common law of England and America, where the judge is a stationary officer, subject to impeachment, and where the jury is unimpeachable, and from its character is peculiarly susceptible to those influences which produce incompetency, it would be impracticable to treat each as subject to the same rule. A jurymen, again, when challenged, may be readily replaced; but as a judge could not sit to try his own competency, every challenge would involve an appeal. It would also be necessary to establish a reserve court to sit subsequently in case a disqualification were found to exist; and since, as to such reserve court, there might be challenges, a trial might be indefinitely suspended for

¹ Mittermaier Deutsch, Str. 1, § 30; Hopfner ueber Anklage Process, p. 257; Wildvogel de Recusat. Jud. Ejusque usu et abusu; Granz Defens. Reor., p. 381; Seuffert von dem Rechte de Peinl.

angeklagten Seinen Richter Auszuschliessen.

² Bentham on Judicial Organization, ch. 16; Jousse, traité 1, p. 555.

want of an ultimate arbiter. For these and other reasons, we have, in English and American practice, no case of the challenge of a judge, it being left to the sense of delicacy and of duty in such high functionaries to retire when interested in an issue brought before them for trial. Should a judge decline to retire in such cases, the remedy is a motion for a new trial,³ or change of venue.⁴ The proper course, if such interest or prejudice is claimed, is to make the objection at the outset. If the judge persist after this in sitting in the case, this lays ground for a new trial,⁵ or for impeachment of the judge.⁶

³ See, *infra*, §§ 1737, 1784.

⁴ *Supra*, § 1537.

⁵ As to writ of error, see *Sale v. State*, 68 Ala. 530.

⁶ In an article in 1877, in the *Solicitors' Journal*, transferred to the *Alb. L. Journal*, we are told that Lord Holt, on the hearing of any question in which he was personally interested, left the bench and sat by the counsel.—See 21 L. J. M. C. 171; cf. remarks of Lord Hobart in *Day v. Savage*, Hob. 87, and of Blackburn, J., in *Mersey Dock Trustees v. Gibbs*, L. R. 1 H. L. 110.

Lord Holt tells of a mayor of Hereford, who was laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he, by the charter, was sole judge of the court.—1 Salk. 395, Eng. Repr.

Lord Coke furnishes, as a ground for the rule, the curious reason that men are generally more foolish in their own concerns than in those of other people (1 Inst. 377); but the real reason for its stringency is that given by Lord Campbell, in *Dimes v. Grand Junction Canal Co.*, 3 H. L. 759, 793, 10 Eng.

Repr. 310, 315, that tribunals should "take care, not only that in their decree they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."

In *R. v. Rand*, L. R. 1 Q. B. 230, it was held that though any pecuniary interest, however small, in the subject-matter, disqualifies a justice, the mere possibility of bias does not render void his judicial decision.—See *London Law Times*, August 11, 1877; *State v. Mewherter*, 46 Iowa 85.

On the second trial of *Tweed*, in New York, 1875, the counsel for the defendant, before the trial began, filed with Judge Noah Davis, then on the bench, a paper, taking exception to his sitting on the trial, because, among other reasons, on a former trial he had "expressed a most unqualified and decided opinion unfavorable to the defendant upon the facts of the case, and declined to charge the jury that they were not to be influenced by such expression of his opinion." Judge Davis was one of several judges, any one of which could have held the court. On receiving this paper Judge Davis,

II. CHALLENGES TO JURY.

§ 1539. **IN GENERAL.** In our own practice the two principal kinds of challenge are, first, to the array, by which is meant the whole jury, as it stands arrayed in the panel, or little square panes of parchment, on which the jurors' names are written; or to the polls, by which is meant the several particular persons or heads in the array.

after consulting with some of his associates, proceeded to try the case, which resulted in the defendant's conviction, on a number of counts, and on a sentence on each count, which was afterwards reversed as to all but the first count.—See, *infra*, §§ 1850, 1939, 1942.

—Judge Davis, when the trial was over, took the extraordinary course of announcing that the counsel offering the protest were guilty of contempt, and “imposing” on the three seniors “a fine of two hundred and fifty dollars each, and order that they stand committed until the fine be paid.” See *Works of David Dudley Field*, vol. II, p. 323. In the *London Law Times* of November 1, 1884, p. 6, the action of Judge Davis in this respect is assailed as inconsistent with all traditions of English law. (See 30 *Alb. L. J.* 401.) Nor, so far as the commitment for contempt is concerned, can it be relied on as a precedent. Aside from the cases mentioned by Mr. Field, where similar objections have been made to judges sitting after expressing an opinion in a case, may be noticed that of *Fries' Trial* (*supra*, § 560; *infra*, § 798a), in which, upon Judge Chase giving in advance an opinion on the law, Messrs. Dallas & Lewis withdrew
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from the defense. Their protest against the action of the court was far more vehement than that of Tweed's counsel in the trial now commented on. Judge Chase was arbitrary enough, but the committal of Messrs. Dallas & Lewis for contempt did not occur to him, and his action in pre-announcing his opinion of the case was afterwards one of the grounds on which he was impeached.

The judge of Kentucky Court of Appeal was shot dead in the courtroom in 1879, by Buford, a party against whom the court had ruled. Buford was convicted of this murder, and the surviving judges, by whom the original case was decided, declined to sit on his appeal after his conviction. The disqualification was put by the judges on the ground (1) that they were witnesses; and (2) that they concurred in the act for which the deceased judge had lost his life.—20 *Alb. L. J.* (N. Y.) 361.

—A special court became necessary under the Kentucky Constitution.

A member of a court to absent himself for a day during the trial disqualifies him for further sitting in the case.—*People v. Shaw*, 63 N. Y. 36. See *Abram v. State*, 4 Ala. 277; *Turbeville v. State*, 56 Miss. 793; *supra*, § 1422.

1. *To the Array.*

§ 1540. **GENERALLY.** Challenge to the array is based on the partiality or default of the sheriff, coroner, or other officer that made the return, and must be made in writing.¹ This may be considered under two heads:

§ 1541. **PRINCIPAL CHALLENGE TO ARRAY IS BASED ON IRREGULARITY OF SELECTION.** Principal challenge to the array, which, if it be made good, is cause for exemption, without resort to triers.¹ Principal challenges to the array are only granted on proof of relationship, partiality, fraud, gross irregularity, or corruption on the part of the officers charged with the selection.² Challenges of this class will be allowed: If the sheriff be the actual prosecutor or the party aggrieved;³ if he be related to either of the parties, and the relationship be existing at the time of the return;⁴ if he return any individual at the request of the prosecutor or the defendant;⁵ or any person whom he believes to be more favorable to one side than to the other;⁶ if he belong at the time to an association for the prosecution of offenders of whom the defendant is claimed to be one;⁷ if an action of battery be depending between him and the defendant, or if the latter have

¹ *People v. Doe*, 1 Mich. 451.

² See, however, *infra*, § 1621.

Objections of this class may be waived by withdrawing the charge.—See *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524.

As to Texas, see *Williams v. State*, 24 Tex. App. 32, 5 S. W. 658.

² *State v. Bradley*, 48 Conn. 535.

³ 1 Leach 101; *Williams' J.*, *Juries*, v; *infra*, § 1620. See *Williams v. Com.*, 91 Pa. St. 493; *State v. Dale*, 8 Ore. 229.

⁴ Co. Lit. 156a; *Williams' Jus*

tice, Juries, v; *Burn's, J., Jurors*, iv 1; *Dick. Sess.* 183, 184.

Officer drawing had married the fourth cousin of the deceased is no ground for challenge of the jury or quashing the indictment.—*State v. McNinch*, 12 S. C. 89.

⁵ Co. Lit. 156a; *Bac. Abr. Juries*, E. 1; *Burn's, J., Juries*, iv 1; *Williams', J., Juries*, v; *Dickinson's Sess.* 184.

⁶ Co. Lit. 156a; *Bac. Abr. Juries*, E. 1.

⁷ *R. v. Dolby*, 2 Barn. & C. 104, 9 Eng. C. L. 54; *infra*, § 1624.

an action of debt against the former;⁸ if the statutory requisitions are not complied with;⁹ in each of these cases the array will be quashed on the presumption of partiality in making up the return.¹⁰ But mere negligence in making up a list of jurors in one precinct of a county is not ground for such a challenge.¹¹

A challenge to the array will be sustained when the sheriff, or his bailiff who makes the return, is under the distress of the party indicting or indicted, or has any

⁸ Co. Lit. 156a; Bac. Abr. Juries, E. 1; Burn's, J., Jurors, iv. 1; Williams', J., Juries, v.; Dick. Sess. 184.

⁹ State v. Da Rocha, 20 La. Ann. 356; State v. Gut, 13 Minn. 341. See State v. Degonia, 68 Mo. 485; State v. Bradley, 32 La. Ann. 402.

¹⁰ Under 3d and 4th Will. IV, ch. 91, it is the duty of the recorder of Dublin annually to revise the list of jurors of the county of that city, and to cause a general list of jurors to be made out and delivered over to the clerk of the peace of the said city for the purposes of the ensuing year. In 1844, upon a conspicuous trial at the bar of the Court of Queen's Bench of Ireland, the defendant challenged the array of the panel on the following grounds, namely: that there had been a fraudulent omission by some person or persons unknown, in the general list of jurors for that year, of the names of sixty persons, who, on the revision of the lists, had been adjudged by the recorder to be qualified to act as special jurors; that from the said list the jurors' book had been made out and framed, and that from the said book the special jurors' list had been made up, the said names

being omitted in the said book and list respectively, and that from the said special jury list the panel had been returned; that the said names had been omitted fraudulently, and not only without the privity of the defendant, or of any person on his behalf, but to his wrong and damage, and contrary to his will and desire; and that such list had been so made up with the intent of prejudicing the defendant on the said trial; and that the plaintiff had due notice of the premises before the panel was arrayed. A general demurrer to the challenge was put in by the plaintiff, which, after argument, was allowed by the court, and the trial having proceeded, judgment was given against the defendant, who sued out a writ of error in parliament thereon. The fifteen judges, being consulted, held unanimously that there was no error; but Lord Denman, C. J., Lord Cottenham and Lord Campbell in the House of Lords, held that the challenge should have been allowed.—R. v. O'Connell, 11 Cl. & Fin. 155, 8 Eng. Rep. 1061, 9 Jurist 30. See Denman's Life, ii, 172.

¹¹ Com. v. Walsh, 124 Mass. 33. See State v. Dozier, 33 La. Ann. 1362.

pecuniary interest in the event, or is counsel, attorney, servant, or arbitrator in the same cause.¹²

But a challenge to the array will not be allowed on the ground that all persons of a particular fraternity have been excluded from the jury, or because certain classes of the community, e. g., persons under thirty were excluded;¹³ or because the number of colored persons was proportionately small;¹⁴ if those who are returned possess the requisite qualifications;¹⁵ nor because a member of the jury was prejudiced;¹⁶ nor because certain other members were incompetent, there being an abundance of competent persons on the list, and no wrongful motive being shown.¹⁷ Nor is such irregularity in drawing a jury as is productive of no prejudice to the defendant usually ground for reversal.¹⁸ Nor will mistakes in jurors' names be ground for quashing the venire.¹⁹

§ 1542. BURDEN IS ON CHALLENGER. The burden of proof is on the person challenging the array, who must

¹² Co. Lit. 156; Bac. Abr. Juries, E. 1; Burn's, J., Jurors, iv 1; Williams', J., Juries, v; Dick. Sess. 184; Vanauken v. Beemer, 4 N. J. L. (1 South.) 364; Munshower v. Patton, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678.

In New York, since the statute authorizing the clerk to array the jury, a challenge to the array lies for partiality or default in the clerk in the same manner as it formerly lay against the sheriff.—Pringle v. Huse, 1 Cow. (N. Y.) 435, 436, n. 1; Gardner v. Turner, 9 Johns. (N. Y.) 261.

As to rule in Texas, see Woodward v. State, 9 Tex. App. 412.

¹³ State v. Bradley, 48 Conn. 535.

¹⁴ Thomas v. State, 67 Ga. 460.

¹⁵ People v. Jewett, 3 Wend. (N. Y.) 314.

¹⁶ Birdsong v. State, 47 Ala. 68.

In New York, it is no ground for challenging the array that the deputy clerk, in the clerk's absence, drew the jury and certified the panel.—People v. Fuller, 2 Park. Cr. Rep. (N. Y.) 16.

As to Pennsylvania, under the old practice, see Com. v. Liffard, 6 Serg. & R. (Pa.) 395.

¹⁷ State v. Foster, 32 La. Ann. 34. See People v. Darr, 61 Cal. 460.

¹⁸ Cox v. People, 80 N. Y. 500, citing Dolan v. People, 64 N. Y. 485; McHugh v. State, 38 Ohio St. 153, 42 Ohio St. 54.

¹⁹ Hubbard v. State, 72 Ala. 164.

be strictly prepared to prove the cause.¹ The mode of proof is to be determined by the court.²

§ 1543. **AFTER PLEA TOO LATE.** A party who neglects before plea to challenge the array can not take advantage of the alleged defect afterwards.¹

The practice in challenging the array is hereafter discussed.²

§ 1544. **CHALLENGE TO ARRAY FOR FAVOR IS WHEN THE QUESTION IS DISPUTED FACT.** Challenges to the array for favor being not a principal challenge are left to the discretion of the triers.¹ Challenges of this class are based on supposed partiality of the sheriff, when such partiality rests upon a disputed or doubtful question of fact. Thus, when the defendant is the sheriff's tenant, or where there is affinity, but no relationship between the sheriff and one of the parties, or where they are united in the same offense,² in these cases there may be a challenge for favor.

2. *To the Polls.*

§ 1545. **INTRODUCTORY.** Challenges to the poll are threefold:

a. Peremptory, where the challenge is absolute, no cause being shown.

b. Principal, where the challenge is for cause shown; and

c. To favor, where there may be a question as to the competence of the juror to serve.

¹ R. v. Savage, 1 Mood. C. C. 51. 15 Eng. C. L. 208, 2 Mann. & R. See Cox v. State, 64 Ga. 374, 37 406; Mikall v. State, 62 Ga. 368.
Am. Rep. 76. *Infra*, § 1620. ² *Infra*, § 1620.

² State v. Linde, 54 Iowa 139, 6 N. W. 168. ¹ 1 Inst. 155; Burn's Justice, Jurors, viii. See, *infra*, §§ 1620, 1621.

As to practice, see Cox v. People, 80 N. Y. 500. ² Dyer 367a; Bac. Abr. Jur. E. 1; Co. Lit. 156a; 1 Cowen 436, n. 1.

¹ R. v. Sutton, 8 Barn. & C. 417, Co. Lit. 156a; 1 Cowen 436, n. 1.

a. Peremptory Challenge.

i. By Prosecution.

§ 1546. PROSECUTION HAS NO PEREMPTORY CHALLENGE, BUT MAY SET ASIDE JURORS. At common law the crown had an unlimited right to unlimited peremptory challenge.¹ This was taken away by the statute 33 Edw. I, ch. 4;² but it was held that under the common law, as modified by that statute, the prosecution possesses the power of setting aside individual jurors until the panel is exhausted, when, if the jury box be not then filled, the set aside jurors will be severally called, and unless adequate cause is shown against them will be chosen.³ Such is the

¹ Proffatt on Jury Trials, § 150.

² *Henries v. People*, 1 Park. Cr. Rep. (N. Y.) 579; *People v. Aichinson*, 7 How. Pr. (N. Y.) 241; *R. v. Frost*, 9 Car. & P. 129, 38 Eng. C. L. 87.

³ *Mansell v. R.* (in error), 8 El. & Bl. 54, 92 Eng. C. L. 53; *Dears. & B.* 375; *R. v. Parry*, 7 Car. & P. 836, 32 Eng. C. L. 898; *R. v. Geach*, 9 Car. & P. 499, 38 Eng. C. L. 294; 3 Harg. St. Tr. 519; 4 Harg. St. Tr. 740; 2 Hale 271; Bac. Abr. Juries, E. 10; 2 Hawk., ch. 43, § 3.

"On the trial of O'Colgley and others, for high treason, before Mr. Justice Buller, at Maidstone, in 1798," says Mr. Townsend (1 Mod. State Trials, 99, n.), "the leading counsel for the prisoner, Mr. Plummer, Mr. Dallas, and Mr. Gurney, declined to interpose, when the crown was exercising their peremptory right of challenge to different jurymen. At length the junior counsel, Mr. W. Scott, jumped up: 'I must be chained down to the ground, my lords, before I can sit here, engaged as I am for the life of one

of the gentlemen at the bar, and submit to these challenges of the crown without cause. The crown has now challenged eleven jurors without cause; a greater number, I believe, than was ever known before.' (In Ireland it is usual to challenge fifty at least.)

"If I had not been restrained by a reason too mighty for me to oppose, I should have resisted these challenges in the beginning.' He was then permitted to argue the point, which he did with great spirit, but at too great length, when Mr. J. Buller interposed, with the not very encouraging remark—'In every case you have quoted, you can not help seeing a decision against you.' The judgment of the court was of course most prompt and decided. 'The construction of the statute is in favor of the right to challenge, and there is no case, no period, in which a different determination has been made. It appears to me one of the clearest points that can be.' See, also, Townsend's narrative of the proceedings in *Frost's Case*, 1 Mod. State Trials 99, n.

practice in those jurisdictions in which there is not a different statutory rule.⁴ The right may be exercised by the prosecution at any period before the jury is elected;⁵ and it was held no error where the prosecution, from excessive caution, set aside a juror who had been before ineffectually challenged by the prisoner.⁶

In Ireland, the right of ordering jurors to stand by, in cases of misdemeanor, may be exercised by a private prosecutor equally with the crown.⁷

§ 1547. PRACTICE UNDER DIRECTION OF COURT, AND SO AS TO ORDER OF CHALLENGE. The practice, however, of permitting the prosecution to defer, showing cause of challenge until the panel be gone through, it was said in a case in North Carolina, must be exercised under the supervision of the court, who will restrain it, if applied to an unreasonable number;¹ and in Georgia, since the adoption of the Penal Code, it is abandoned altogether.²

⁴ MD.—*Turpin v. State*, 55 Md. 462. N. C.—*State v. Arthur*, 13 N. C. (2 Dev. L.) 217; *State v. Craton*, 28 N. C. (6 Ired. L.) 164; *State v. Bone*, 52 N. C. (7 Jones L.) 121. PA.—*Com. v. Joliffe*, 7 Watts 585; *Jewell v. Com.*, 22 Pa. St. 94; *Haines v. Com.*, 100 Pa. St. 317; *Smith v. Com.*, 100 Pa. St. 324; *Com. v. Keenan*, 10 Phila. 194. S. C.—*State v. Stalmaker*, 2 Brev. L. 1. FED.—*United States v. Wilson*, 1 Bald. 78, 81, Fed. Cas. No. 16730; *United States v. Douglass*, 2 Blatchf. 207, Fed. Cas. No. 14989.

In *United States v. Butler*, 1 Hugh. 457, Fed. Cas. No. 14700, it is said that this right ceases to exist where the prosecution has the right of peremptory challenge.

⁵ Otherwise under statute.—*State v. Steeley*, 65 Mo. 218. See *Savage v. State*, 18 Fla. 909.

⁶ *Wormeley v. Com.*, 51 Va. (10 Gratt.) 658.

⁷ *R. v. McCartie*, 11 Ir. C. L. R. 207.

¹ *State v. Benton*, 19 N. C. (2 Dev. & Bat. L.) 196; though see *State v. Craton*, 28 N. C. (6 Ired. L.) 164.

² *Sealy v. State*, 1 Ga. 213; *Reynolds v. State*, 1 Ga. 222.

In Ohio, the "prosecuting attorney and every defendant may peremptorily challenge two of the panel, and any of the panel for cause, of which the court shall try."—Code Cr. Proc., § 133; *Warren's Ohio C. L.* (1870), p. 131.

In Pennsylvania, by the revised acts of 1860, the commonwealth shall have the right, in all cases, to challenge peremptorily four persons, and every peremptory challenge beyond the number allowed by law in any of the said

The order of challenge is at the discretion of the court; though in most jurisdictions the defendant is required to make his challenges first.³

ii. By Defendant.

§ 1548. IN FELONIES PEREMPTORY CHALLENGES ALLOWED TO DEFENDANT AT COMMON LAW. At common law peremptory challenges by the defendant are taken without assigning any reason, and when made must necessarily be allowed. In cases of felony, the defendant was permitted, at common law, peremptorily to challenge thirty-five, or one under the number of three full juries.¹ But by 22 Hen. VIII, ch. 14, sec. 7, made perpetual by 32 Hen. VIII, ch. 3, no person arraigned for petit treason, high treason, murder, or felony, can be admitted peremptorily to challenge more than twenty of the jurors; and by 33 Hen. VIII, ch. 23, sec. 3, the same restriction is extended to cases of high treason. As far, however, as these statutes respect either high or petit treason, it is agreed that they were repealed by the 1 and 2 Phillip and Mary, ch. 10, which, by enacting that all trials for treason shall be carried on as at common law, has revived the original number as far as it respects those offenses.² At the present

cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.—See, *infra*, § 1548, note.

This act is constitutional.—Warren v. Com., 37 Pa. St. 45; Hartzell v. Com., 40 Pa. St. 463. See Com. v. Frazier, 2 Brewst. (Pa.) 490.

This act does not deprive the commonwealth of its right to set aside.—Warren v. Com., 37 Pa. St. 45.

Statutes regulating practices are noticed under the next head.

³ See Spigener v. State, 62 Ala.

383; Turpin v. State, 55 Md. 462; State v. Bone, 52 N. C. (7 Jones L.) 121; Brandreth's Case, 32 St. Tr. 771, 774.

Allter under Missouri statutes.—State v. Steele, 65 Mo. 219.

¹ Co. Lit. 156; Bro. Abr. Challenge 70, 75, 217; 2 Hale 268; 2 Hawk., ch. 43, § 7; Com. Dig. Challenge C. 1; Bac. Abr. E. 9; 4 Bla. Com. 354; 2 Woodes. 498; Burn's, J., Jurors, iv.; Williams', J., Juries, v.; Dick. Sess. 185.

² Co. Lit. 156; Bro. Abr. Challenge 217; 3 Inst. 227; Fost. 106, 107; 2 Hale 269; 2 Hawk., ch. 43, § 8; Bac. Abr. Juries, E. 9; Burn's,

day, therefore, in cases of high and petit treason, the defendant has thirty-five peremptory challenges; and in murders and all other felonies, twenty.²

J., Jurors, 1v; Williams, J., Juries, v; Dick. Sess. 185.

§ 4 Mason 159; Fost. 106, 107; 4 Bla. Com. 354; 2 Hawk., ch. 43, § 8; 1 Chitty Cr. L. 535.

Under the New York Revised Statutes it has been held that the people are entitled to two peremptory challenges in a criminal prosecution.—*People v. Caniff*, 2 Park. Cr. Rep. (N. Y.) 586.

Where a statute gives the right to a prisoner on trial "for an offense punishable with death, or imprisonment in a state prison ten years or any longer time," a person indicted for burglary in the second degree, which is punishable "by imprisonment in a state prison for a term not more than ten years, nor less than five years," is entitled to peremptory challenges.—*Dull v. People*, 4 Denio (N. Y.) 91. See, further, *Granger v. State*, 13 Tenn. (5 Yerg.) 459, 26 Am. Dec. 278.

Under the Pennsylvania Revised Statutes, if the commonwealth waives the right to challenge, and the defendant exhausts his challenges, the commonwealth can not resume its right.—*Com. v. Frazier*, 2 Brewst. (Pa.) 490.

Practice in Federal Courts. The Act of Congress passed on the 20th July, 1840 (5 Stats. at Large 394), confers upon the courts of the United States the power to make all necessary rules and regulations for conforming the empanelling of juries to the laws and usages in force in the states.—*United States v. Shackelford*, 59

U. S. (18 How.) 588, 15 L. Ed. 495.

This power includes that of regulating the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal, with the exception, in criminal cases, of treason or other crimes, of which the punishment is declared to be death.—*Ibid.* See *United States v. Johns*, 1 Wash. 363, Fed. Cas. No. 15481.

—The Act of 1790 recognizes the right of peremptory challenge in those cases, and therefore it can not be taken away.—*Ibid.* See *United States v. Johns*, 1 Wash. 363, Fed. Cas. No. 15481.

—The Act of July 20, 1840, does not confer, in misdemeanors, the right to a peremptory challenge in the Circuit Courts.—*United States v. Devlin*, 6 Blatchf. 71, Fed. Cas. No. 14953. See, however, *United States v. Coppersmith*, 2 Flipp. 546, 4 Fed. 198.

—Under the Act of Congress, July 20, 1825 (5 Stats. at Large 394), the courts of the United States have the power to adopt the statutes of the several states respecting the empanelling, etc., of jurors, the right of challenge, etc., except in respect to treason, and other crimes specified in § 30, Act of 1790 (1 Stats. at Large 119), and where these statutes have been adopted, the right of peremptory challenge, either by the prisoner or the government, must depend on them.—*United States v. Shackelford*, 59 U. S. (18 How.) 588, 15 L. Ed. 495.

§ 1549. **RULE AS TO JOINT DEFENDANTS AND SEVERAL COUNTS.** Whether each of several joint defendants, when the trial is joint, is entitled to his full number of challenges is a point usually determined by local statute.¹ The right unquestionably exists at common law when not given by statute,² though its difficulties may be obviated by the prosecution obtaining an order for severance in cases where the defendants persist in separate sets of challenges.³ But where the trial is joint, a peremptory

—By the Act of March 3, 1865, when the offense charged be treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On a trial for any other offense in which the right of peremptory challenge now exists, the defendant shall be entitled to ten and the United States to two peremptory challenges. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.—Act of March 3, 1865, § 2; 13 Stat. 500.

Challenges above the number allowed by law shall be disallowed by court.—Rev. Stat., § 1031.

Prosecution must announce its peremptory challenges before the defendant can be compelled to announce his.—*State v. Steeley*, 65 Mo. 218, 27 Am. Rep. 271.

As to practice in this respect, see, *infra*, § 1608.

¹ In several states when defendants elect to be tried jointly, they are restricted to a single set of challenges.—*Brister v. State*, 26 Ala. 107; *People v. McCalla*, 8 Cal. 301; see *Mahan v. State*, 10 Ohio 232; *State v. Sutton*, 10 R. I. 159.

Aliter in Mississippi.—*Smith v. State*, 57 Miss. 822.

One defendant can not object to his co-defendant's challenges, when separate challenges are permitted.—See, *infra*, § 1595.

² *Hale P. C.* 263; 1 *Chitty Cr. L.* 536. GA.—*Cruce v. State*, 59 Ga. 83. KAN.—*State v. Durein*, 29 Kan. 688. MISS.—*Smith v. State*, 57 Miss. 822. R. I.—*State v. Sutton*, 10 R. I. 159. VT.—*State v. Stoughton*, 51 Vt. 362. FED.—*United States v. Marchant*, 25 U. S. (12 Wheat.) 480, 6 L. Ed. 700; *United States v. Marchant*, 4 Mas. 158, Fed. Cas. No. 16682.

See, also, cases cited *infra*, § 1616.

³ *Fost.* 106.

"Where two are jointly indicted and tried for a capital offense, each prisoner is allowed twenty peremptory challenges, but the law does not allow more than five to the state as to both."—*Randall, C. J.*, *Savage v. State*, 18 Fla. 951, citing *State v. Earle*, 24 La. Ann. 38, 13 Am. Rep. 109; *Mahan v. State*, 10 Ohio 232; citing *Schoeffler v. State*, 3 Wis. 823.

State can not extend its challenges in such cases beyond the statutory limit.—*Goodin, In re*, 67 Mo. 637.

challenge from one defendant excludes a juror, though against the protest of the other defendant.⁴ Where offenses of a kindred character are joined, the defendant is not ordinarily entitled to his allotment of peremptory challenges upon each count or separate offense on the indictment or information.⁵ But it is otherwise, so it has been held, when a series of distinct charges are tried together.⁶

§ 1550. ON PRELIMINARY ISSUES NO CHALLENGE. On the preliminary trial of a prisoner's insanity, before the trial of the indictment against him, he has not the privilege of peremptory challenges; but he may challenge for cause.¹

§ 1551. — NOR ON COLLATERAL ISSUES. Peremptory challenges are not allowable on the trial of any collateral issue.¹

§ 1552. RIGHT CEASES WHEN PANEL IS COMPLETE. It has been said that the defendant's right to a peremptory challenge is waived when the juror is passed over to the court or the prosecution;¹ but this opinion can not be maintained as a binding rule,² since it has been repeatedly held that the court, at any moment before the juror in question

In Maryland joint defendants by statute have only one set of challenges.—*Hamlin v. State*, 67 Md. 383, 10 Atl. 214, 301.

⁴ *Infra*, § 1616; *State v. Meaker*, 54 Vt. 112.

⁵ *State v. Skinner*, 34 Kan. 256, 8 Pac. 420.

⁶ *State v. McNeill*, 93 N. C. 552. See *People v. Sweeney*, 55 Mich. 586, 22 N. W. 50.

¹ *Freeman v. People*, 4 Den. (N. Y.) 9, 35, 47 Am. Dec. 216.

¹ *Fost.* 42; *Burn's Justice*, Jurors, viii.

¹ CONN.—*State v. Potter*, 18 Conn. 166. MASS.—Though see

Com. v. Knapp, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491; *Com. v. Rogers*, 48 Mass. (7 Met.) 500, 31 Am. Dec. 458. MISS.—*Stewart v. State*, 50 Miss. 587. FED.—*United States v. Hanway*, 2 Wall. Jr. 139, 143, Fed. Cas. No. 15299.

See, also, *infra*, §§ 1611-1613.

² *Infra*, § 1613. ALA.—*Drake v. State*, 51 Ala. 30. CAL.—*People v. McCarthy*, 49 Cal. 241; *People v. Iams*, 57 Cal. 115. CONN.—*State v. Potter*, 18 Conn. 166. FLA.—*Savage v. State*, 18 Fla. 909. KAN.—*State v. Durein*, 29 Kan. 688. MD.—*Turpin v. State*, 55 Md. 462. MICH.—*People v. Carrier*, 46

is sworn, may permit the challenge. But in any view the right ceases when the panel is complete and accepted.²

§ 1553. IN MISDEMEANORS, NO PEREMPTORY CHALLENGES AT COMMON LAW. Peremptory challenges are not allowed at common law in trial for a misdemeanor.¹

§ 1554. MATURED CHALLENGE CAN NOT ORDINARILY BE RECALLED. A defendant who, in case of felony, has challenged twenty jurors peremptorily, can not ordinarily withdraw one of those challenges to challenge another juror, instead of one whom he had previously challenged;¹ nor for the purpose of challenging for cause.² But in case of a mistake, not negligent or capricious, made in challenging, permission should be given to rectify.³

§ 1555. RIGHT IS TO REJECT, NOT SELECT. The right of peremptory challenge is a right not to select, but to reject.¹

The practice as to peremptory challenges is discussed in a future head.²

Mich. 442, 9 N. W. 437. OHIO—*Hooker v. State*, 4 Ohio 350. PA.—*McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308; *Zell v. Com.*, 94 Pa. St. 258. VA.—*Hendrick v. Com.*, 32 Va. (5 Leigh) 708.

See, also, cases *infra*, §§ 1609-1613.

² See *State v. Pritchard*, 15 Nev. 7; *State v. Cameron*, 2 Chand. (Wis.) 172; *infra*, §§ 1608, 1615.

¹ *Freeman v. People*, 4 Den. (N. Y.) 9, 35, 47 Am. Dec. 216; see *United States v. Devlin*, 6 Blatchf. 71, Fed. Cas. No. 14953; *Reading's Case*, 7 Howell's State Trials 265; *Oates' Case*, 10 Howell's State Trials 1079, 4 Bl. Com. 353, note by Mr. Christan.

See, *supra*, § 1548, note.

¹ *R. v. Parry*, 7 Car. & P. 836, 32 Eng. C. L. 898. See, *infra*, § 1615.

² *Infra*, § 1615.

³ *Infra*, § 1615.

¹ *Turpin v. State*, 55 Md. 462; *State v. Smith*, 24 N. C. (2 Ired. L.) 402; *State v. Wise*, 7 Rich. (S. C.) 412; *State v. McQuaige*, 5 S. C. 429; *United States v. Marchant*, 25 U. S. (12 Wheat.) 480, 6 L. Ed. 700; *United States v. Marchant*, 4 Mas. 158, Fed. Cas. No. 16682; see, *infra*, § 1616.

Compare: *People v. Bodine*, 1 Den. (N. Y.) 281.

² *Infra*, §§ 1612 et seq.

b. Principal Challenge, or Challenge for Cause.

§ 1556. PRINCIPAL CHALLENGE IS WHERE THE CASE DOES NOT REST ON DISPUTED FACT. Principal challenge to the polls is where a cause is shown, which, if found true, stands sufficient of itself, without leaving anything to be tried by the triers.¹ The theory is that in such case the presumption of partiality is too strong to be rebutted.² As in our American practice challenges for favor, and those for principal cause, are frequently blended,³ the various incidents of the two will be here considered.⁴ It may be noticed that in New York the distinction between the two classes is retained.⁵

Causes of principal challenge to the polls are such as these:

i. Preadjudication of Cause.

§1557. PREADJUDICATION OF CAUSE GROUND FOR CHALLENGE. In England it is a good cause for challenge, on the part of the defendant, that the juror has declared his opinion beforehand that the party is guilty, or will be hanged;¹ but it is said that expressions used by a jurymen previous to the trial are not a cause of challenge, unless they can be referred to something of personal ill-will towards the party challenging.² In this country, as will presently be seen, the great preponderance of authority is that the holding by a juror of any opinions which may prevent him from rendering a verdict in accordance with the laws of the land is a disqualification.³

¹ Burn's Justice, Jurors, viii.
Infra, § 1606.

² State v. Howard, 17 N. H. 171.

³ Infra, § 1606.

⁴ Infra, § 1606.

⁵ Greenfield v. People, 74 N. Y. 277, 6 Abb. N. C. 1, reversing 13 Hun 242, 2 Cow. Cr. Rep. 479.

¹ 2 Hawk., ch. 43, § 28.

² R. v. Edmonds, 4 Barn. & Ald. 472, 6 Eng. C. L. 564, 2 Hawk., ch. 43, § 28.

³ See cases cited infra. See, also, People v. Reyes, 5 Cal. 347; Pierce v. State, 13 N. H. 536.

§ 1558. VAGUE AND LOOSE TALK DOES NOT DISQUALIFY. Mere opinions thrown out as a jest, however, or as a vague and loose talk, or to avoid being empaneled, will not so operate.¹

§ 1559. — NOR DOES A GENERAL BIAS AGAINST CRIME. A juror, also, will not be incapable because of the general bias and prejudice against crime,¹ or against the particular line of offenses, one of which is on trial.²

1. Analysis of Rulings as to Preadjudication.

§ 1560. IN UNITED STATES COURTS A DELIBERATE OPINION AS TO DEFENDANT'S GUILT DISQUALIFIES, BUT OTHERWISE AS TO MERE IMPRESSION. "The court has considered," declared Marshall, C. J., in Burr's trial, "those who have deliberately formed and delivered an opinion on the guilt of the prisoner as not being in a state of mind to weigh the testimony, and therefore as being disqualified to sit as jurors in the case."¹ The question was accordingly sanctioned by the court: "Have you formed and ex-

¹ *Infra*, §§ 1564, 1565. ALA.—*State v. Williams*, 3 Stew. 454. CONN.—*State v. Potter*, 18 Conn. 166; *State v. Willson*, 38 Conn. 140. GA.—*Johns v. State*, 16 Ga. 200. MASS.—*Com. v. Thrasher*, 77 Mass. (11 Gray) 57. N. C.—*State v. Ellington*, 29 N. C. (7 Ired. L.) 61; *State v. Bone*, 52 N. C. (7 Jones L.) 121. PA.—*Ortwein v. Com.*, 76 Pa. St. 414, 18 Am. Rep. 420; *Com. v. Flanagan*, 7 Watts & S. 68, 415; *Com. v. Gross*, 1 Ashm. 261; *Com. v. Lenox*, 3 Brewst. 247. VA.—*Hallstock's Case*, 43 Va. (2 Gratt.) 564; *Clore's Case*, 49 Va. (8 Gratt.) 606; *Montague v. Com.*, 51 Va. (10 Gratt.) 767.

See, also, cases cited *infra*, §§ 1576, 1587.

No matter how extravagant the remarks may be they will not exclude, if uttered for the purpose of producing an exclusion.—*Moughon v. State*, 59 Ga. 308.

Compare: *Territory v. Kennedy*, 3 Mont. 520; 8 Crim. Law Mag. 559.

Whether opinion is such as to influence mind of juror, is the test of competency.—See note 36 Am. Dec. 527.

¹ *Williams v. State*, 3 Ga. 453. See, *infra*, § 1604.

² *Elliott v. State*, 73 Ind. 10; *United States v. Noelke*, 17 Blatchf. 554, 1 Fed. 426.

¹ Marshall, C. J., 1 Burr's Trial 416. See, also, *United States v. Woods*, 4 Cr. 484, Fed. Cas. No. 16760.

pressed an opinion about the guilt of Colonel Burr?"² The qualification "and delivered," or, as it is sometimes put, "and expressed," has more recently been dropped, and rightly, since while forming an opinion as to guilt without expressing it ought to incapacitate, this is not necessarily the case with expressing such an opinion without forming it.³

Taney, C. J., in 1854, laid down the following test in a criminal trial in Baltimore:

"If the juror had formed an opinion that the prisoners are guilty and entertains that opinion now, without waiting to hear the testimony, then he is incompetent.⁴ But if, from reading the newspapers or hearing reports, he has impressions on his mind unfavorable to the prisoners, but has no opinion or prejudice which will prevent him from doing impartial justice when he hears the testimony, then he is competent."

The same view has been expressed in the United States Circuit Court in New York.⁵

In 1879, it was held by the Supreme Court that a juror who states he has formed an opinion, and does not think it will influence his verdict, is not incompetent.⁶

§ 1561. — AND SO IN MAINE. In Maine, to be a sufficient ground for disqualifying a juror from sitting in the trial of a criminal prosecution, the opinion formed by him must be fixed and unconditional.¹

§ 1562. — AND SO IN NEW HAMPSHIRE. In New Hampshire, where jurors heard the prisoner tried upon another indictment, before another jury, and found guilty,

² Marshall, C. J., 1 Burr's Trial 367.

³ United States v. Wilson, 1 Bald. 78, Fed. Cas. No. 16730; Hanway's Case, 2 Wall. Jr. 139, Fed. Cas. No. 15299; see, supra, § 1558.

⁴ See, infra, § 1734.

⁵ United States v. McHenry, 6 Blatchf. 503, Fed. Cas. No. 15681.

⁶ Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244.

¹ State v. Kingsbury, 58 Me. 239 (Appleton, C. J., 1871). See State v. Jewell, 33 Me. 583.

and answered upon inquiry that they had formed an opinion of his guilt upon the second indictment, which was pending at the same time, from the evidence which they had heard on the other trial, they were held to be incompetent.¹ But "hearing" without "opinion" does not incapacitate.²

§ 1563. IN VERMONT PRIOR EXPRESSION OF OPINION DISQUALIFIES. In Vermont, the prior expression of an opinion has been held to disqualify, notwithstanding the juror declares, when challenged, that he has no opinion, and could try the case impartially.¹ But it is now the law in that state that an opinion, to disqualify, must be an abiding bias produced by substantial facts, the truth of which the juror believes.²

§ 1564. IN MASSACHUSETTS PREJUDICE MUST GO TO PARTICULAR ISSUE. In Massachusetts, a juror having said upon the voir dire that he had formed an opinion from what he had heard, but that he did not know how much he might be influenced by it, was allowed to be challenged for cause.¹ A juror, however, it is said, can not be asked whether he considers that the facts set forth in the indictment constitute a proper subject for punishment.² And a person indicted is not entitled to have the jury asked,

¹ State v. Webster, 13 N. H. 491.

² State v. Howard, 17 N. H. 171.

Question of indifference is a fact to be decided by the court at the trial.—State v. Pike, 49 N. H. 399, 6 Am. Rep. 533, citing Com. v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711. See Rollings v. Aimes, 2 N. H. 350; State v. Howard, 17 N. H. 171, 191, 192; March v. Portsmouth & C. R. Co., 19 N. H. 372.

¹ State v. Clark, 42 Vt. 629. See State v. Phair, 48 Vt. 366.

² State v. Meaker, 54 Vt. 112; Wade v. State, 54 Vt. 358; State v. Meyer, 58 Vt. 457, 3 Atl. 195.

¹ Com. v. Knapp, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491.

For practice in detail, see Mr. Bemis' Report of the Webster case, p. 8.

² Com. v. Buzzell, 33 Mass. (16 Pick.) 153.

Shaping and propounding of the interrogatories are within the discretion of the court.—Com. v. Gee, 60 Mass. (6 Cush.) 177. See, *infra*, § 1619.

before they are empaneled, whether they have formed or expressed an opinion as to the credibility of a witness, whose testimony is to be relied on in support of the prosecution, and who testified, and whose credibility was in question, in another case before them.³

A fixed opinion of the unconstitutionality of the statute on which the prosecution is founded, which if persisted in would preclude concurrence in a conviction, disqualifies.⁴

A juror having convicted the defendant of a similar offense at the same term is not, it has been ruled in the same state, though without good reason, thereby incapacitated.⁵

"Hearing" as to a case does not incapacitate, when there is no opinion formed.⁶

§ 1565. — So IN CONNECTICUT. In Connecticut, merely having read newspaper reports of a case, by a juror who "had not any settled opinion on the subject, and felt that he could render an impartial verdict," does not disqualify.¹

§ 1566. IN NEW YORK, AT COMMON LAW, OPINION BUT NOT IMPRESSION, DISQUALIFIES. In New York, it was held in the earlier cases that an opinion as to the defendant's guilt,

³ Com. v. Porter, 67 Mass. (1 Gray) 476.

⁴ Com. v. Austin, 73 Mass. (7 Gray) 51; *infra*, § 1802.

⁵ Com. v. Hill, 86 Mass. (4 Allen) 591. See criticism, *infra*, § 1596.

⁶ Com. v. Thrasher, 77 Mass. (11 Gray) 57.

¹ State v. Potter, 18 Conn. 166.

Butler, C. J., said in 1871: "The opinion must be formed in such a way, or be of such a character, that hostility or prejudice toward the prisoner may be inferred from its existence or expression. But

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hostility or prejudice can not, as a rule, be inferred from an opinion formed and expressed simply from reading, or hearing stated, as current news of the day, the fact of a homicide and the circumstances attending it. There should be found some other circumstances of relationship, partiality, prejudice, hostility, or ill-will, acting at the same time upon the mind and giving it a bias, or the juror should be accepted."—State v. Willson, 38 Conn. 140. See, also, State v. Hoyt, 47 Conn., 518, 36 Am. Rep. 89.

no matter from what sources it was drawn, disqualifies.¹ The mere forming of an opinion, also, without its expression, is considered a sufficient ground of exclusion.² An impression, however, does not disqualify.³ Nor does a hypothetical⁴ or indecisive opinion.⁵ But it is otherwise as to an opinion formed by reading a report, no matter how incomplete, of a former trial, when this opinion is so settled as to make a change difficult.⁶

§ 1567. — BUT BY STATUTE NO DISQUALIFICATION IF WITNESS BE NOT UNDER BIAS. By the New York Criminal Code, § 376, a juror is not disqualified by the fact that he has formed and expressed an opinion in respect to the case on trial, if he shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror.¹

¹ *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *People v. Bodine*, 1 Den. (N. Y.) 281; *Freeman v. People*, 4 Den. (N. Y.) 9, 35, 47 Am. Dec. 216; *Blake v. Millsbaugh*, 1 Johns. (N. Y.) 316; *Pringle v. Huse*, 1 Cow. (N. Y.) 432; *Vermilyea, Ex parte*, 6 Cow. (N. Y.) 555.

² *People v. Rathbun*, 21 Wend. (N. Y.) 509.

See, *supra*, § 1560; also, *Armistead v. Com.*, 38 Va. (11 Leigh) 657, 37 Am. Dec. 633; *Heath v. Com.*, 40 Va. (1 Rob.) 735.

³ *People v. Honeyman*, 3 Den. (N. Y.) 121; *People v. Hayes*, 1 Edm. Sel. Cas. (N. Y.) 582; *O'Brien v. People*, 36 N. Y. 276, 3 Abb. Pr. N. S. 368, 2 Transc. App. 5; *Cox v. People*, 80 N. Y. 500;

affirming 19 Hun 430; *People v. Oyer and Terminer Court*, 83 N. Y. 436; *O'Brien v. People*, 48 Barb. (N. Y.) 274; *People v. Balbo*, 19 Hun (N. Y.) 424; affirmed, 80 N. Y. 484.

⁴ *Lohman v. People*, 1 N. Y. 379; *People v. Fuller*, 2 Park. Cr. Rep. (N. Y.) 16; *Stout v. People*, 4 Park. Cr. Rep. (N. Y.) 71.

⁵ *Thomas v. People*, 67 N. Y. 218; *People v. Mallon*, 3 Lans. (N. Y.) 225 (Mullin, P. J.), 1870.

⁶ *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1, as explained by Andrews, J., in *People v. Balbo*, 19 Hun (N. Y.) 424, 80 N. Y. 484. See *Thomas v. People*, 67 N. Y. 218; *Ponder v. People*, 18 Hun (N. Y.) 560.

¹ *Stokes v. People*, 53 N. Y. 164,

The statute, however, does not prevent such opinion from being ground of a challenge for favor.²

By an act passed May 7, 1853, all challenges are to be determined by the trial court, without the interposition of triers,³ though the decision of such court is open to review on appeal.⁴

§ 1568. IN NEW JERSEY, HYPOTHETICAL OPINION DOES NOT EXCLUDE. In New Jersey, a hypothetical opinion, which is based on the supposition that certain facts are true, does not by itself exclude.¹

§ 1569. IN PENNSYLVANIA, OPINION, BUT NOT IMPRESSION, DISQUALIFIES. In Pennsylvania, if a juror forms an opinion without waiting to hear the testimony, he is incompetent. But an impression from reading a newspaper or hearing reports, without any opinion or prejudice which will prevent him from doing impartial justice when he hears the testimony, will not disqualify.¹ And the opinion

13 Am. Rep. 492; *Cox v. People*, 80 N. Y. 500; *People v. Cornetti*, 92 N. Y. 85; *People v. Casey*, 93 N. Y. 115; *Balbo v. People*, 19 Hun (N. Y.) 424; affirmed, 80 N. Y. 484.

In *Phelps v. People*, 72 N. Y. 334, 13 N. Y. Sup. Ct. 6 Hun (N. Y.) 44, it was held that a juror who says he has formed and expressed an opinion, but that he believes he can render an impartial verdict, according to the evidence, unbiased and uninfluenced by the previously formed opinion, is competent.

In *People v. Beckwith*, 108 N. Y. 67, 15 N. E. 53, it is ruled that mere difficulty in procuring a juror is no evidence that the jurors chosen were under bias.

Section of Criminal Code is considered in *Young v. Johnson*, 53 N. Y. Sup. Ct. (46 Hun), 167, where

it is held, following *People v. Casey*, ut supra, that, to make a juror who has formed an opinion competent, he must declare (1) that such an opinion will not influence his verdict; (2) that he can render an impartial verdict; and (3) the court must be satisfied as to his freedom from such bias.

² *Thomas v. People*, 67 N. Y. 218.

³ See, infra, § 1620, note.

⁴ *Greenfield v. People*, 74 N. Y. 277; *Balbo v. People*, 19 Hun (N. Y.) 424; affirmed, 80 N. Y. 484.

¹ *State v. Spencer*, 21 N. J. L. (1 Zab.) 196, citing *Mann v. Glover*, 14 N. J. L. (2 Green) 195. See *State v. Fox*, 25 N. J. L. (1 Dutch) 566.

¹ *Shevlin v. Com.*, 106 Pa. St. 362; *Weston v. Com.*, 111 Pa. St. 251, 2 Atl. 191; *Irvine v. Kean*, 14 Serg. & R. (Pa.) 292; see *Com. v. Flanagan*, 7 Watts & S. (Pa.)

must be founded on the evidence to be given, or must be a fixed belief.² If he swears that he would act impartially, and decide according to the evidence, he is competent, no matter how strong his impression may have been.³

§ 1570. — So IN DELAWARE AND MARYLAND. In Delaware, the test adopted by Marshall, C. J., in Burr's case, appears to have been received.¹ In Maryland, the view of Chief Justice Taney, as given above, is adopted, impressions derived from newspapers being held no disqualification. "The newspaper is now read by every one, and the press is ever ready and eager to furnish the details of crime, and although persons may, upon such statements, form an opinion, yet it is one in most cases liable to qualification, according to the real facts of the case. . . . The opinion which should exclude a juror must be a fixed and deliberate one, partaking, in fact, of the nature of a pre-judgment."²

§ 1571. — So IN VIRGINIA. In Virginia, decided prejudice or bias excludes, though not mere hypothetical

415; *Com. v. Gross*, 1 Ashm. (Pa.) 281; *Com. v. Lenox*, 3 Brewst. (Pa.) 249; *Com. v. Work*, 4 Crumrine (Pa.) 493.

² *Curley v. Com.*, 84 Pa. St. 151, 4 W. N. C. 141.

A juror testifies on his *voir dire*, in the above case, that he had a fixed opinion from what he had read, but that it was not such an opinion as would influence him in any degree as a juror to give undue weight to evidence against the prisoner, and that he felt certain he could divest his mind of all prejudice, and be controlled only by the evidence. It was held by the Supreme Court that he was competent, inasmuch as he had no

fixed belief of the guilt of the prisoner, and had no opinion founded upon the evidence to be given. *S. P., Ortwein v. Com.*, 76 Pa. St. 414, 18 Am. Rep. 420; *O'Mara v. Com.*, 75 Pa. St. 424.

Otherwise where the witness said he had an opinion from reading a former trial, which opinion "it would take some evidence to remove."—*Staup v. Com.*, 74 Pa. St. 458.

³ *Allison v. Com.*, 99 Pa. St. 17.

¹ *State v. Bonwell*, 2 Har. (Del.) 529. See *State v. Anderson*, 5 Har. (Del.) 493.

² *Waters v. State*, 51 Md. 430; *Zimmerman v. State*, 56 Md. 536—*Robinson, J.*

opinions,¹ which would not prevent the juror from giving the defendant a fair trial.²

§ 1572. — So IN NORTH AND SOUTH CAROLINA. In North Carolina, the rule is that an opinion fully made up and expressed against either party, on the subject-matter of the issue to be tried, is good cause of principal challenge; but an opinion imperfectly formed, or one merely hypothetical, that is, founded on the supposition that facts are as they have been represented or assumed to be, does not constitute a cause of principal challenge, but

¹ *Lithgow v. Com.*, 4 Va. (2 Va. Cas.) 297; *Clore's Case*, 49 Va. (8 Gratt.) 606; *Jackson v. Com.*, 64 Va. (23 Gratt.) 919.

² *Sponce v. Com.*, 4 Va. (2 Va. Cas.) 375; *Polland v. Com.*, 26 Va. (5 Rand.) 659; *Brown v. Com.*, 29 Va. (2 Leigh) 769; *Oslander v. Com.*, 30 Va. (3 Leigh) 780, 24 Am. Dec. 693; *Hendrick v. Com.*, 32 Va. (5 Leigh) 708; *Armistead v. Com.*, 38 Va. (11 Leigh) 357; *Heath v. Com.*, 40 Va. (1 Rob.) 735; *Hallstock's Case*, 43 Va. (2 Gratt.) 564; *Page v. Com.*, 68 Va. (27 Gratt.) 954; *Cluverius v. Com.*, 81 Va. 789.

In *Wright v. Com.*, 73 Va. (32 Gratt.) 491, it was held that the juror's statement that he did not think he could do the defendant justice, was ground for challenge, though the juror modified this by saying that if the evidence was different from what he had heard he believed he would be unprejudiced.

In *Dejarnette v. Com.*, 75 Va. 867, a juror was held disqualified who stated that he had formed an opinion which he could not say whether evidence would remove, though he believed he could give

the defendant a fair trial. See *Com. v. Buzzell*, 33 Mass. (16 Pick.) 158.

It is not enough to disqualify a juror, according to the view of Leigh, J., "that if the facts and circumstances proved on the trial should be the same with those which the jurors had heard, then they had a decided opinion."—*Epes' Case*, 46 Va. (5 Gratt.) 676.

An opinion founded on mere rumor ought *prima facie* to be regarded as a mere hypothetical opinion, forming no ground for challenge, unless it appear that the opinion formed is a decided one, likely to influence the juror in his decision.—*Armistead v. Com.*, 38 Va. (11 Leigh) 657, 37 Am. Dec. 633; *Epes' Case*, 46 Va. (5 Gratt.) 681; see *Wormeley v. Com.*, 51 Va. (10 Gratt.) 658; *Montague v. Com.*, 51 Va. (10 Gratt.) 767, 768; *Dilworth v. Com.*, 53 Va. (12 Gratt.) 689, 65 Am. Dec. 264; *Bristow v. Com.*, 56 Va. (15 Gratt.) 634; *Page v. Com.*, 68 Va. (27 Gratt.) 954.

In West Virginia an adverse opinion, which the juror can not say will be removed by evidence, disqualifies.—*State v. Schnelle*, 24 W. Va. 767.

may be urged by way of challenge to the favor, which is to be allowed or disallowed, as the triers may find the fact of favor or indifferency.¹ In the same state on a challenge for cause, the juror stated "that he had formed and expressed an opinion adverse to the prisoner, upon rumors which he had heard; but that he had not heard a full statement of the case, and that his mind was not so made up as to prevent the doing of impartial justice to the prisoner." The court found the juror indifferent, and the Supreme Court refused to reverse the decision.² And in South Carolina the mere contingent opinion of the juror that if the defendant is guilty he should be punished, does not exclude.³

§ 1573. — So IN OHIO. In Ohio, under sec. 7278 of the Revised Statutes, a juror whose opinion is formed, not from the testimony of witnesses, but from newspaper reports, is not incompetent, if he testify that if selected he could render an impartial verdict, the court agreeing with him in this conclusion.¹ But it is otherwise where the juror's opinion is formed from reading the testimony at the coroner's inquest.²

§ 1574. — So IN ALABAMA. In Alabama, in a capital case, it is held not to be ground of challenge of a juror that upon common report he has formed and expressed an opinion of the guilt of the prisoner, if the juror believes

¹ State v. Benton, 19 N. C. (2 Dev. & Bat. L.) 196; State v. Bone, 52 N. C. (7 Jones L.) 121; State v. Cockman, 60 N. C. (2 Wins. L.) 95.

Triers are now dispensed with in North Carolina.—State v. Kilgore, 93 N. C. 533.

² State v. Ellington, 29 N. C. (7 Ired.) 61; State v. Kilgore, 93 N. C. 533. See State v. Efler, 85 N. C. 585, to the effect that the

prejudice must be against the challenging party.

³ State v. Coleman, 20 S. C. 441.

¹ Cooper v. State, 16 Ohio St. 328; Frazier v. State, 23 Ohio St. 551; McHugh v. State, 38 Ohio St. 153.

² Frazier v. State, 23 Ohio St. 551; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; McHugh v. State, 38 Ohio St. 153; McHugh v. State, 40 Ohio St. 154.

that such opinion would have no influence in the formation of his verdict, should the evidence on the trial be different from the report of the facts.¹ Under the statute of Alabama of 1831, which provides that if a juror, in a capital case, has formed and expressed an opinion founded upon rumor, he shall be sworn in chief, it must appear that such opinion was founded upon mere rumor. Where it appears that a fixed opinion was formed, it is good ground for challenge for cause.² But a hypothetical opinion based on rumor does not disqualify.³

§ 1575. — So IN MISSISSIPPI. In Mississippi the rule is, that while it is not necessary to exclude a juror, that he should have formed and expressed his opinion against the accused with malice or ill-will, a mere hypothetical opinion, from rumor only, and subject to be changed by the testimony, does not disqualify.¹ If a juror, however, has formed a settled opinion, as distinguished from a mere hypothetical conception based on rumor, he ought to be excluded,² though he may never have expressed that opinion.³ It is otherwise, however, as to a juror who has formed an opinion from what he has heard had been said by some of the witnesses in the case, though he himself had not heard any of the witnesses say anything on the subject, and though he states that his opinions are not such as would influence his verdict, but that he would be governed by the evidence. A fortiori the formation of an

¹ State v. Williams, 3 Stew. 454; State v. Morea, 2 Ala. 275; Carson v. State, 50 Ala. 134; Hall v. State, 51 Ala. 9; De Arman v. State, 71 Ala. 351; Jackson v. State, 77 Ala. 18.

² Quesenbury v. State, 3 Stew. & P. 308. See Ned v. State, 7 Port. 187; Bales v. State, 63 Ala. 30.

³ Beason v. State, 72 Ala. 191.

¹ Noe v. State, 5 Miss. (4 How.)

330; Ogle v. State, 33 Miss. 383; Lee v. State, 45 Miss. 114.

² Logan v. State, 50 Miss. 269; Brown v. State, 57 Miss. 424.

³ State v. Fowler, 1 Miss. (Walk.) 318; State v. Johnson, 1 Miss. (Walk.) 392. See King v. State, 6 Miss. (5 How.) 730; Sam v. State, 21 Miss. (13 Sm. & M.) 189; Nelms v. State, 21 Miss. (13 Sm. & M.) 500, 53 Am. Dec. 94; White v. State, 52 Miss. 216.

opinion by one who had heard all the testimony is a disqualification. And while absolute freedom from preconceived opinion should be required where it can be had, yet where, from the notoriety of the transaction or other cause, that can not be obtained, as near an approximation to it as possible should be had.⁴

§ 1576. — So IN MISSOURI. In Missouri, by statute, opinion formed only on rumors or newspaper reports, and producing no bias which evidence can not remove, does not disqualify.¹ It is otherwise with an opinion formed on evidence before the coroner.² A juror may be asked whether he could give an impartial verdict.³

§ 1577. — So IN TENNESSEE. In Tennessee, it has been declared that loose impressions and conversations of a juror, as to the prisoner's guilt or innocence, founded upon rumor, would not have the effect to set him aside as incompetent; nor, if disclosed after verdict, be a cause of new trial.¹ But an emphatic opinion of guilt excludes.² The statute, however, providing that no opinion formed on published reports shall be ground for challenge, has been held unconstitutional.³ But mere opinion that the

⁴ Cotton v. State, 31 Miss. 504; Ogle v. State, 33 Miss. 383; Alfred v. State, 37 Miss. 296; Parker v. State, 55 Miss. 414.

¹ State v. Davis, 29 Mo. 391; State v. Rose, 32 Mo. 560; State v. Burnside, 37 Mo. 343; State v. Core, 70 Mo. 491; State v. Barton, 71 Mo. 491; State v. Walton, 74 Mo. 270; State v. Baber, 74 Mo. 292, 41 Am. Rep. 314; State v. Farrow, 74 Mo. 531; State v. Snell, 78 Mo. 243; Hayes v. State, 78 Mo. 307; State v. Hopkirk, 84 Mo. 278; State v. Willson, 85 Mo. 135.

This statute is constitutional.— Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578.

² State v. Cullen, 82 Mo. 323; State v. Bryant, 92 Mo. 273, 6 S. W. 102.

³ State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

¹ Howerton v. State, 19 Tenn. (Meigs) 262; Moses v. State, 30 Tenn. (11 Humph.) 232; Alfred v. State, 32 Tenn. (2 Swan) 581; Major v. State, 36 Tenn. (4 Sneed) 597; Cartwright v. State, 80 Tenn. (12 Lea) 620.

Compare: M'Gowan v. State, 17 Tenn. (9 Yerg.) 154.

² Brakefield v. State, 33 Tenn. (1 Sneed) 215. See Norfleet v. State, 36 Tenn. (4 Sneed) 340.

³ Eason v. State, 65 Tenn. (6 Baxt.) 466.

defendant should be punished does not exclude, when such opinion was not founded on evidence to be introduced on trial.⁴

§ 1578. — So IN INDIANA. In Indiana it is ruled that when the juror answers that he has formed or expressed an opinion of the defendant's guilt, the nature and cause of the opinion must be inquired into; and, if it appear that the juror has formed or expressed an opinion of the defendant's guilt out of ill-will to the prisoner, or that he has such a fixed opinion of the defendant's guilt as would probably prevent him from giving an impartial verdict, the challenge ought to be sustained.¹ If, however, it was said, the opinion be hypothetical, or of that transient character formed when we hear any reports of the commission of an offense—such an opinion merely as would probably be changed by the relation of the next person met with—it is not a sufficient cause of challenge.²

§ 1579. — So IN ILLINOIS. In Illinois, the rule is said to be that a juror is disqualified if he has formed or expressed a decided opinion upon the merits of the case.¹ If, on the contrary, he says he has no prejudice or bias of any kind for or against either party; that he has heard rumors in relation to the case, but has no personal knowledge of the facts, and from the rumors has formed and expressed an opinion in a particular way, if they are true,

⁴ Johnson v. State, 79 Tenn. (11 Lea) 47.

¹ McGregg v. State, 4 Blackf. (Ind.) 101; Brown v. State, 70 Ind. 576.

Compare: Heacock v. State, 42 Ind. 393.

² Ibid.; Rice v. State, 7 Ind. 332; Fleming v. State, 11 Ind. 234; Bradford v. State, 15 Ind. 347; Morgan v. State, 31 Ind. 193;

Fahnestock v. State, 23 Ind. 231; Clem v. State, 33 Ind. 419; Cluck v. State, 40 Ind. 263; Hart v. State, 57 Ind. 102; Gillooley v. State, 58 Ind. 182; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; Elliott v. State, 73 Ind. 10, cited, supra, § 1559; Noe v. State, 92 Ind. 92.

¹ Neely v. People, 13 Ill. 685; Gates v. People, 14 Ill. 433; Gray v. People, 26 Ill. 344.

without expressing any belief in their truth; he would not be disqualified.²

It is held, also, the formation of a vague unformulated opinion³ is not good cause for a challenge.⁴ A juror was held incompetent who declared that no amount of circumstantial evidence would induce him to convict a defendant.⁵ And the same ruling was had with another who declared that he would not convict, even if convinced of the prisoner's guilt.⁶

The statute of Illinois, providing that rumor shall not disqualify if the juror testifies he could give a fair verdict, is interpreted by the courts of that state to mean that the juror is to give his verdict on the evidence produced on trial, and in this sense is not unconstitutional.⁷

§ 1580. — So IN ARKANSAS. In Arkansas, if a juror in a criminal case state upon his voir dire that he has formed an opinion as to the guilt or innocence of the prisoner from rumor, he should be required to state, also, that the opinion was not such as to bias or prejudice his mind, in order to render him competent; and if he state that he has conversed with persons about the case, and formed his opinion from such conversations, he should be required to state further, that such persons did not profess to have a personal knowledge of the matters stated by them; but it is not necessary that he should know or be able to state whether such persons were witnesses in the case.¹ In any view a hypothetical opinion does not exclude.² But if there be a fixed opinion, the

² Smith v. Eames, 4 Ill. (3 Scam.) 78; Gardner v. People, 4 Ill. (3 Scam.) 83; Thomson v. People, 24 Ill. 60, 76 Am. Dec. 733.

To the same effect is Baxter v. People, 8 Ill. (3 Gilm.) 386; Leach v. People, 53 Ill. 311.

³ Supra, §§ 1563 et seq.

⁴ Noble v. People, 1 Ill. (Breese) 54. See, supra, § 1560.

⁵ Gates v. People, 14 Ill. 433. Infra, § 1601.

⁶ Ibid.

⁷ Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80.

¹ Meyer v. State, 19 Ark. 156.

² Dolan v. State, 40 Ark. 454.

juror's belief that he could fairly try the case does not qualify him.³

§ 1581. — So IN GEORGIA. In Georgia, it is said, that while a juror who states that he has formed and expressed an opinion in a particular case, upon the guilt or innocence of the prisoner, is not competent to sit in such case;¹ and that while the opinion which disqualifies depends upon the nature and strength of the opinion, and not upon its source or origin;² yet the mere formation of an opinion by a juror, from rumor, without having expressed that opinion, or expressed it otherwise than jocularly,³ is not good cause of challenge.⁴ The opinion must be settled and abiding.⁵ And an opinion on one fact in the prosecution's case does not disqualify.⁶

§ 1582. — So IN IOWA. In Iowa, an unqualified opinion as to the guilt or innocence of the prisoner, formed from rumor, is sufficient to exclude a juror.¹ But the

³ *Chiles v. State*, 45 Ark. 165.

¹ *Reynolds v. State*, 1 Ga. 222;

Anderson v. State, 14 Ga. 709.

² *Boon v. State*, 1 Ga. 631.

³ *Baker v. State*, 15 Ga. 498;

John v. State, 16 Ga. 200.

⁴ *Hudgins v. State*, 2 Ga. 173;

Griffin v. State, 15 Ga. 476; *Baker*

v. State, 15 Ga. 498; *Anderson v. State*, 14 Ga. 709.

⁵ *Wright v. State*, 18 Ga. 383.

⁶ *Lloyd v. State*, 45 Ga. 57. *Infra*, § 1588.

Opinion formed from mere report will not exclude as a juror.—*Thompson v. State*, 24 Ga. 297; *Maddox v. State*, 32 Ga. 581, 79 Am. Dec. 307; *Westmoreland v. State*, 45 Ga. 228, qualifying *Boon v. State*, 1 Ga. 618; *Ray v. State*, 15 Ga. 223; and *Jim v. State*, 15 Ga. 535.

The words, "If that is so, the prisoner deserves to be hung,"

used before a trial by a juror, in reply to a statement by a third person, does not show a fixed opinion of guilt that would be sufficient ground for a new trial.—*Mercer v. State*, 17 Ga. 146.

—On the other hand, it has been held a sufficient disqualification of a juror, on a trial for murder, that he was heard to say before the trial, "that from what he knew, he would stretch the prisoner."—*Monroe v. State*, 5 Ga. 85.

As to practice in reference to trier in Georgia, see *Willis v. State*, 12 Ga. 444; *Copenhagen v. State*, 14 Ga. 22.

¹ *Wau-kon-chau-neek-kaw v. United States*, 1 Morris (Iowa) 332; *State v. Shelledy*, 8 Iowa 477.

Compare: *State v. Ostrander*, 18 Iowa 435.

Opinion as to guilt of accused does not necessarily disqualify one

opinion must be absolute, and not such as, in the judgment of the juror, would leave him without bias in the case.² Nor does it exclude that such a qualified opinion is formed on reading partial reports of the case.³ And a conditional or hypothetical opinion does not exclude.⁴

When the opinion is as to the killing, and not as to the defendant's guilt, it does not exclude.⁵

§ 1583. **RULE IN WISCONSIN AND NEBRASKA.** In Wisconsin, a juror on his examination stated that he had an opinion on the question of the defendant's guilt or innocence if what he had heard was true; that he had heard the story talked about, but had not read the report of the examination before the coroner, or heard the story from witnesses, or those who had heard the testimony, and that his opinion would not prevent his hearing testimony impartially. It was held that this was cause for challenge to the favor, but not for principal cause.¹

In Nebraska mere impression or hypothetical opinion does not exclude.² It is otherwise as to a firm belief.³

from serving on the jury.—*State v. Sopher*, 70 Iowa 494, 30 N. W. 917; *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211; *State v. Field*, 80 Iowa 34, 56 N. W. 276.

² *State v. Sater*, 8 Iowa 420; *State v. Nelson*, 58 Iowa 208, 12 N. W. 253.

Impression on part of some jurors accused was connected with commission of the crime, does not constitute a disqualifying opinion.—*State v. Brown*, 130 Iowa 57, 106 N. W. 379.

³ *State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403; *State v. Shelton*, 64 Iowa 333, 20 N. W. 459.

Compare: *State v. Crofford*, 121 Iowa 395, 96 N. W. 889.

⁴ *State v. George*, 62 Iowa 682, 18 N. W. 298.

⁵ *State v. Thompson*, 9 Iowa 188, 74 Am. Dec. 342; *State v. Ostrander*, 18 Iowa 434; but see *State v. Bryan*, 40 Iowa 379; *infra*, § 1587.

¹ *Schoeffler v. State*, 3 Wis. 823.

² *Curry v. State*, 4 Neb. 545; *Carroll v. State*, 5 Neb. 3; *Curry v. State*, 5 Neb. 412; *Smith v. State*, 5 Neb. 183; *Murphy v. State*, 15 Neb. 383, 19 N. W. 489.

Compare: *Carroll v. State*, 5 Neb. 31.

As to construction of Nebraska statute (similar to that of New York), see *Palmer v. State*, 4 Neb. 68.

³ *Olive v. State*, 11 Neb. 1, 7 N. W. 444.

§ 1584. IN MICHIGAN OPINION MUST BE UNQUALIFIED. In Michigan, an opinion "partial" but not "positive" does not disqualify.¹ Hence, mere vague impression does not disqualify.² But it is otherwise when evidence would be required to overcome the prepossession.³

§ 1585. — So IN CALIFORNIA. In California, having formed and expressed an opinion from report does not disqualify a person to sit as a juror if he declares he can sit on the jury without bias, that evidence can change his opinion, and that he will be governed by the evidence.¹ It was formerly otherwise when the opinion was unqualified,² but now by statute such an opinion does not exclude if the juror believes he can decide according to the evidence.³ The challenge must specify the particular cause.⁴ It is not material that the juror did not state whether his opinion was for or against the prisoner. The courts will not permit the juror to be questioned on that point.⁵

§ 1586. — So IN LOUISIANA. In Louisiana, opinion based on common rumor, such opinion being without any prejudice or bias against the accused, does not disqualify.¹ If the juror believes he could render an impartial

¹ Holt v. People, 13 Mich. 224; Burden v. People, 26 Mich. 162.

² Holt v. People, 13 Mich. 224; Stewart v. People, 23 Mich. 63, 9 Am. Rep. 78; Cargan v. People, 39 Mich. 540; People v. Barker, 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539; People v. Shufelt, 61 Mich. 237, 28 N. W. 79.

³ Stephens v. People, 38 Mich. 156; see Ulrich v. People, 39 Mich. 245; Stephens v. People, 38 Mich. 739.

⁴ People v. Murphy, 45 Cal. 137; People v. Johnston, 46 Cal. 78; People v. Mahony, 48 Cal. 180.

⁵ People v. Edwards, 41 Cal. 640;

People v. Brotherton, 43 Cal. 530;

People v. Johnston, 46 Cal. 80;

People v. Brown, 48 Cal. 253.

³ People v. Macauley, 1 Cal. 379;

People v. Cochran, 61 Cal. 548.

⁴ People v. Walsh, 43 Cal. 447.

⁵ People v. Williams, 6 Cal. 206.

¹ State v. Ward, 14 La. Ann.

673; State v. Caulfield, 23 La. Ann.

148; State v. Birdwell, 36 La. Ann.

857; State v. Melton, 37 La. Ann.

77; State v. Ford, 37 La. Ann. 444;

State v. Boyd, 38 La. Ann. 374.

Opinion based on conversation not a ground for challenge where the prospective juror states that he can try the case and render

verdict, he is not on this ground open to challenge.² But a fixed opinion disqualifies,³ and so of ascertained prejudice.⁴

§ 1587. — So IN KANSAS, FLORIDA, TEXAS, AND COLORADO. In Kansas a mere hypothetical opinion or floating impression does not exclude,¹ nor an impression received from newspaper reports,² though it is otherwise as to a settled belief.³ In Florida the same rule obtains in all cases where the juror states he can give a fair verdict;⁴ and in Texas,⁵ and in Colorado.⁶

ii. General Propositions as to Prejudice.

§ 1588. OPINION MUST GO TO WHOLE CASE. The opinion, to disqualify, must go to the whole case. If it touches merely insulated portions, it may not be ground for challenge.¹ Thus, a juror will not be set aside because he

his verdict according to the law and evidence.—State v. Melton, 37 La. Ann. 77; State v. Boyd, 38 La. Ann. 374.

² State v. Hugel, 27 La. Ann. 375; State v. Coleman, 27 La. Ann. 691; State v. Guidry, 28 La. Ann. 630; State v. Dugay, 35 La. Ann. 327; State v. Covington, 45 La. Ann. 979, 13 So. 266; State v. Vogel, 49 La. Ann. 1057, 22 So. 308; State v. Williams, 49 La. Ann. 1148, 22 So. 750.

Fear in mind of prospective juror, and a feeling that he could not be competent, disqualifies, although expressing an opinion that he could decide the cause according to the evidence.—State v. Ramsey, 50 La. Ann. 139, 24 So. 302.

³ State v. Ricks, 32 La. Ann. 1098; State v. Jackson, 37 La. Ann. 768.

⁴ State v. Johnson, 33 La. Ann. 889; State v. Barnes, 34 La. Ann.

395; State v. De Rance, 34 La. Ann. 186, 44 Am. Rep. 426; State v. Diskins, 35 La. Ann. 46; State v. Revells, 35 La. Ann. 302.

¹ Roy v. State, 2 Kan. 405.

² State v. Medlicott, 9 Kan. 257; State v. Crawford, 11 Kan. 32.

³ State v. Brown, 15 Kan. 400; see State v. Bancroft, 22 Kan. 170; State v. Spaulding, 24 Kan. 1; State v. Paterson, 28 Kan. 204; State v. Miller, 29 Kan. 43.

⁴ O'Connor v. State, 9 Fla. 215; Montague v. State, 17 Fla. 662; Metzger v. State, 18 Fla. 481.

⁵ Grissom v. State, 4 Tex. App. 374; Rothschild v. State, 4 Tex. App. 519; Post v. State, 10 Tex. App. 579; Thompson v. State, 19 Tex. App. 594.

⁶ Jones v. People, 6 Colo. 452, 45 Am. Rep. 526; May v. People, 8 Colo. 210, 6 Pac. 816.

¹ State v. Thompson, 9 Iowa 188; State v. Ostrander, 18 Iowa 434; Holt v. People, 13 Mich. 224.

believes that there was an offense committed;² because he believes that if certain facts be true the defendant is guilty;³ because he has drawn an inference from a single inculpatory fact;⁴ or because he even holds that the fact of homicide, though not its malice, is to be traced to defendant, the issue being on malice.⁵ But a fixed opinion of a principal's guilt may disqualify on trial of the accessory.⁶

§ 1589. JUROR MUST ANSWER QUESTIONS, BUT NOT TO INCULPATE HIMSELF. The prevailing opinion, in this country, is that a juror must answer, under oath, any question asked him with regard to his competency as a juror, providing such question does not tend to degrade him, or make him infamous.¹ Hence, he will not be excused from

Issues in prior case disqualifying juror in later case.—*People v. Mol*, 137 Mich. 692, 4 Ann. Cas. 960, 68 L. R. A. 871, 100 N. W. 913.

² *State v. Ostrander*, 18 Iowa 434; *Holt v. People*, 13 Mich. 224; *Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78.

Opinion of juror as to presence of poison upon body of deceased with opinion as to guilt of accused, does not disqualify.—*People v. Folglesong*, 116 Mich. 556, 74 N. W. 730.

³ *Lee v. State*, 45 Miss. 114.

⁴ *Lloyd v. State*, 45 Ga. 57.

⁵ *Wright v. State*, 18 Ga. 383; *State v. Thompson*, 9 Iowa 188; *State v. Ostrander*, 18 Iowa 434; *Lowenberg v. People*, 27 N. Y. 336, 26 How. Pr. 202; *Lowenberg v. People*, 5 Park. Cr. Rep. (N. Y.) 414; affirmed 27 N. Y. 336; *Conatser v. State*, 80 Tenn. (12 Lea) 436.

⁶ *Arnold v. State*, 9 Tex. App. 435.

This is required by statute.—*Stagner v. State*, 9 Tex. App. 440; *Lewis v. State*, 15 Tex. App. 647.

¹ *Infra*, §§ 1610, 1618; 7 *Dane's Abridgment* 334; *Edward's Juror's Guide* 85. DEL.—*State v. Bonwell*, 2 Harr. 529. GA.—*Epps v. State*, 19 Ga. 102. MASS.—*Com. v. Knapp*, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491. MO.—*State v. Mann*, 83 Mo. 589. N. J.—*State v. Zellers*, 7 N. J. L. (2 Halst.) 220. N. Y.—*People v. Bodine*, 1 Den. 281. N. C.—*State v. Benton*, 13 N. C. (2 Dev. & B. L.) 196. PA.—*Howser v. Com.*, 51 Pa. St. 333; *Staup v. Com.*, 74 Pa. St. 458. S. C.—*State v. Crank*, 2 Ball. L. 66, 23 Am. Dec. 117; *State v. Baldwin*, 3 Brev. L. 309. TENN.—*Fletcher v. State*, 25 Tenn. (6 Humph.) 249. VA.—*Lithgow v. Com.*, 4 Va. (2 Va. Cas.) 297; *Heath v. Com.*, 40 Va. (1 Rob.) 735.

Contra: *State v. Spencer*, 21 N. J. L. (1 Zab.) 196.

As doubting.—See *Dilworth v.*

stating whether he has any prejudice against a religious sect, on the ground that the answer would tend to disgrace him.² But questions that would disgrace or criminate him he will not be compelled to answer.³

§ 1590. — **MUST FIRST BE SWORN ON VOIR DIRE.** He must, of course, be sworn on his voir dire before he can be interrogated.¹ And this is the usual practice.² But the question may be determined, without examining him, on extrinsic proof.³

§ 1591. **COURT MAY ASK QUESTIONS NOT STATUTORY.** As it is the duty of the court to empanel, for the trial of each case, a competent and impartial jury, the courts may propound to the jurors returned other interrogatories than those which they are required to put by statute.¹

§ 1592. **ONLY PARTY PREJUDICED MAY CHALLENGE.** A challenge of a juror, because of his having formed and expressed an opinion on the question to be tried, can be made, at common law, only by that party against whom it was so formed and expressed. In such case the other party can not interpose.¹

Com., 53 Va. (12 Gratt.) 689, 65 Am. Dec. 264.

In England the practice is not accepted.—*R. v. Edmonds*, 4 Barn. & Ald. 471, 6 Eng. C. L. 564.

As to what questions may be asked on voir dire.—*State v. Modoll*, 12 Fla. 151. See, also, notes 26 Am. St. Rep. 85, 62 Am. St. Rep. 340.

See, also, post, § 1593, footnote 2.

² *People v. Christie*, 2 Abb. Pr. (N. Y.) 256, 2 Park. Cr. Rep. (N. Y.) 579.

³ *Ibid.*; *Hudson v. State*, 1 Blackf. (Ind.) 317; *Burt v. Panchand*, 99 U. S. 180, 25 L. Ed. 451.

¹ *State v. Flower*, 1 Miss. (1 Walk.) 518; *King v. State*, 6 Miss.

(5 How.) 730; *Com. v. Jones*, 28 Va. (1 Leigh) 598.

See, also, *infra*, § 1618.

Right extends to cross-examination.—*Infra*, § 1618.

² *Staup v. Com.*, 74 Pa. St. 458; *O'Mara v. Com.*, 75 Pa. St. 424.

³ *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89.

¹ *Infra*, §§ 1619, 1620, note; *Com. v. Gee*, 60 Mass. (6 Cush.) 177; *Stephens v. Com.*, 38 Mich. 739; *Pierce v. State*, 3 N. H. 536; *Montague v. Com.*, 51 Va. (10 Gratt.) 767.

As to manner of putting questions, see §§ 1608, 1619, 1620.

¹ *State v. Benton*, 13 N. C. (2 Dev. & B. L.) 196.

§ 1593. JUROR MAY BE EXAMINED AS TO DETAILS. If the juror answers that he has not formed or expressed an opinion on the merits, that he can justly weigh the testimony and render an impartial verdict, the examination is not closed, but either party¹ may proceed to ask him such questions as may further test his competency, and in case of sufficient reason appearing on the voir dire to form cause for challenge, he may be challenged for favor, and, as will be seen more fully hereafter,² at common law the

¹ *State v. Brown*, 35 La. Ann. 340; *Howser v. Com.*, 50 Pa. St. 333; *Hardin v. State*, 4 Tex. App. 355; *Ray v. State*, 4 Tex. App. 450.

² *People v. Bodine*, 1 Den. (N. Y.) 281; *Heath v. Com.*, 40 Va. (1 Rob.) 735.

See, *infra*, §§ 1606, 1620, 1622.

Questions which have been allowed by the courts.—The following questions, in the several cases in which they occur, were adopted as determining the competency of the juror:—

"Have you formed and expressed an opinion about the guilt of Colonel Burr?"—*Marshall, C. J., Burr's Trial*, 1 *Burr's Trial* 367.

"Have you formed and delivered an opinion on the subject-matter of this indictment?"—*Chase, J., in United States v. Callender, Callender's Trial*, Pamphlet 19-21.

"Have you heard anything of this case, so as to make up your mind?" "Do you feel any bias or prejudice for or against the prisoner at the bar?"—*Parker, J., Selfridge's Trial*, Pamphlet, p. 9.

"Have you formed and expressed an opinion of the guilt or innocence of the prisoner?"—*Marshall, C. J., in United States v. Hare, etc., Crim. Proc.*—128

U. S. Circuit Court for Baltimore, May T. 1818, Pamphlet.

"Have you formed and expressed an opinion as to the general guilt or innocence of all concerned in the commission of the offense?" (namely, the burning of the convent in Charlestown, Mass.)—*Supreme Court of Mass., on trial of the Charlestown rioters, Com. v. Buzzell*, 33 Mass. (16 Pick.) 153.

"Have you made up your minds as to which of the two parties was in the wrong in the Kensington riots?"—*Rogers, J., Supreme Court of Pennsylvania*, April 29, 1845, in *Com. v. Sherry*, one of the Kensington rioters, MSS.

1. "Have you, at any time, formed or expressed an opinion, or even entertained an impression, which may influence your conduct as a juror?"

2. "Have you any bias or prejudice on your mind for or against the prisoner?"—*Ogden, J., on a homicide trial; People v. Johnson*, 2 Wheel. C. C. (N. Y.) 387.

1. "Have you expressed or formed any opinion relative to the matter now to be tried?"

2. "Are you sensible of any prejudice or bias therein?"

question of his bias submitted to triers. But after the court has approved a juror the right to question is closed.³

§ 1594. **BIAS MUST GO TO IMMEDIATE ISSUE.** The bias, however, must go to the particular issue; and on autrefois acquit the question is not opinion as to guilt, but general bias for or against the defendant.¹ Prejudice as to a particular kind of evidence, however, on which the case depends, may exclude.² An opinion that the defendant killed the deceased does not exclude, when the killing is conceded, and the question is self-defense, as to which the juror had formed no opinion.³ That a bias against crime does not disqualify we have already seen.⁴

§ 1595. **RELATIONSHIP AND BUSINESS ASSOCIATION A CAUSE FOR CHALLENGE.** There are other causes of challenge, which, though less common in this country than that which has been just noticed, have been frequently acted on. Thus, a principal challenge will be allowed if the

3. "Had you formed an opinion that the law of the United States, known as the Fugitive Slave Law of 1850, is unconstitutional—so that you can not convict a person indicted under it for that reason, if the facts alleged in the indictment are proved and the court held the statute to be constitutional?"

4. "Do you hold any opinion upon the subject of the Fugitive Slave Law, so called, which would induce you to refuse to convict a person indicted under it, if the facts set forth in the indictment and constituting the offense are proved against him, and the court direct you that the law is constitutional?"—Curtis, J., in *United States v. Morris*, charged with attempting to rescue a fugitive slave, Boston, 1851, and approved by Grier, J., and Kane, J., in *Phila.*, 1852; *United States v. Hanway*, 2

Wall. Jr. 139, *Fed. Cas. No.* 15299.

On the trial of *Dorr*, the following questions asked by the attorney-general were rejected by the court:—

"Did you vote for the *Dorr* constitution?"

"Do you believe the defendant to have been governor of Rhode Island?"—7 *Bost. Law Rep.* 347.

See, also, *supra*, § 1589, footnote 1.

A juror may be asked whether he belongs to an association for punishing crime.—*State v. Mann*, 83 *Mo.* 581; *infra*, § 1604.

³ *Bales v. State*, 63 *Ala.* 30.

¹ *Supra*, § 1558; *Josephine v. State*, 39 *Miss.* 613; *State v. Carrick*, 16 *Nev.* 120; *State v. Harworth*, 24 *Utah* 408, 68 *Pac.* 155.

² *Infra*, § 1601.

³ *State v. Wells*, 28 *Kan.* 321.

⁴ *Supra*, § 1559.

juror be within the age of twenty-one;¹ if a female;² if he be of blood or kindred to either party,³ within the prohibited degrees;⁴ if he be intimately connected by affinity with either party,⁵ though if the relationship be remote, as where the juror's sister was the wife of the nephew of one of the parties, the rule is otherwise.⁶ By the old English common law it was held a disqualification that the juror was godfather to the child of the defendant, or the defendant to his child.⁷ It is cause for challenge juror is in the employment of one of the parties.⁸

¹ 1 Inst. 157. See, *infra*, § 1786.

² Burn's Justice, tit. Jurors, viii, p. 965.

In *State v. Ketchey*, 70 N. C. 621, it was ruled that because of a juror's being first cousin to the prisoner is no good cause of challenge by the prisoner, unless it be shown that ill-feeling or bad blood exists between the juror and the prisoner.

³ 1 Inst. 157; *State v. Baldwin*, 80 N. C. 390.

⁴ *O'Connor v. State*, 9 Fla. 215; *Smith v. State*, 61 Miss. 754; *State v. Perry*, 44 N. C. (1 Busb. L.) 330; *Parrish v. State*, 80 Tenn. (12 Lea) 655; *Jacques v. Com.*, 51 Va. (10 Gratt.) 690.

Under the Missouri statute a juror who said that his father was second cousin to the defendant's mother was excluded.—*State v. Walton*, 74 Mo. 270. See *Wirebach v. Bank*, 97 Pa. St. 543, 39 Am. Rep. 821; *Todd v. Gray*, 16 S. C. 635.

See, *infra*, § 1786.

⁵ *Bank v. Hart*, 3 Day (Conn.) 491, 3 Am. Dec. 274; *Hinchman v. Clark*, 1 N. C. (Coxe) 446; *Stevenson v. Stiles*, 3 N. J. L. (2 Pen.) 543.

If the affinity is ruptured by

death of the intermediate link (e. g., where the prisoner's wife, who was cousin to the juror, is dead without issue), then the rule does not apply.—*State v. Shaw*, 25 N. C. (3 Ired. L.) 532. See, *infra*, § 1786.

⁶ *Rank v. Shewey*, 4 Watts (Pa.) 218.

Discovered that the prisoner has a relation on the jury, made during the trial of a case of felony, this is no ground for discharging the jury, and the case must proceed.—*R. v. Wardle*, 1 Car. & M. 647, 41 Eng. C. L. 351. See, also, *Moses v. State*, 30 Tenn. (11 Humph.) 232; and see, *infra*, §§ 1785, 1786.

—The weight of authority, and the better doctrine in this country, is to the effect that where a juror is discovered, after the commencement of the trial, to be incompetent, he may be discharged, and a new jury impaneled to try the cause.—See *State v. Hansford*, 76 Kan. 678, 14 L. R. A. (N. S.) 548, 92 Pac. 551.

See note 14 L. R. A. (N. S.) 548.

⁷ 1 Inst. 157.

⁸ *Springer v. State*, 34 Ga. 379; *Central R. Co. v. Mitchell*, 63 Ga. 173; *Hubbard v. Rutledge*, 57 Miss.

§ 1596. — AND SO OF PRIOR CONNECTION WITH CAUSE. It is no ground of challenge that the juror on a prior case had found a verdict against the defendant on a prosecution for a distinct offense.¹ This has been pushed so far that in Massachusetts² jurors who had just convicted the defendant for keeping a liquor nuisance at one date, were held competent to sit on a prosecution against him for keeping the same kind of nuisance at a subsequent date. But this is a hard decision. The quality of proof in the two cases was the same, the question of date being merely technical; and the jurors in the first case must be viewed as having in the most solemn way formed and expressed an opinion on the second. But it is good ground for challenge that the juror has given a prior verdict on the same subject-matter, though against another defendant;³ that he was one of the grand jury who found the particular bill;⁴ that he was counsel, servant of, or under close obligations to either party;⁵ that

7; and other cases cited *infra*, § 1596.

¹ *United States v. Shackelford*, 3 Cr. 178, Fed. Cas. No. 16260; *Sawdon's Case*, 2 Lewin C. C. 117.

² *Com. v. Hill*, 86 Mass. (4 Allen) 591. See, *supra*, § 1564.

³ 1 Inst. 157; *Jacobs v. State*, 9 Tex. App. 278.

Merely having been sworn as a juror, in a prior trial, however, on which there was a *nolle prosequi* before testimony received, is not a disqualification.—*Reed v. State*, 50 Ga. 556.

⁴ ALA.—*Birdsong v. State*, 47 Ala. 68; *Finch v. State*, 81 Ala. 41, 1 So. 565. IND.—*Barlow v. State*, 2 Blackf. 115; *Rogers v. Lamb*, 3 Blackf. 155; *Rice v. State*, 16 Ind. 298. OHIO.—*Stewart v. State*, 15 Ohio St. 155. W. VA.—*State v. McDonald*, 9 W. Va. 456. ENG.—*Roy v. Percival*, 1 Sid. 243, 82 Eng.

Repr. 1083; *R. v. Cook*, 13 St. Tr. 334.

See 2 Rev. Stat. N. Y. 734, § 8; Rev. Stat. Mass., ch. 137, § 2.

Being on the list of a grand jury without sitting on the case does not disqualify.—*Rafe v. State*, 20 Ga. 60.

When objection too late: And it has been ruled too late to take the objection after the juror has been accepted.—*Davis v. State*, 54 Ala. 93.

In Florida, serving on a coroner's inquest, without forming an opinion, is said not to disqualify, when the question of the guilt of the defendant did not come up.—*O'Connor v. State*, 9 Fla. 215; *State v. Madoll*, 12 Fla. 151.

⁵ 1 Inst. 157; *Springer v. State*, 34 Ga. 379, and cases cited *supra*, § 1595.

he was concerned in getting up the prosecution;⁶ though it is no cause of challenge that he is brother of one of the counsel of the opposite party;⁷ that he is client of the prisoner, who is a member of the bar;⁸ that, being a clergyman, he had preached the funeral sermon of the deceased, the prosecution being for murder;⁹ or that he lodges as a pay boarder with the defendant.¹⁰ But he is incompetent if he has been bona fide summoned as a witness for either of the parties;¹¹ if he be bail for the defendant;¹² and if, on an indictment for riot, he be an inhabitant of the town where the riot occurred, and had taken an active part in the matter which led to it.¹³

§ 1597. — AND SO OF PARTICIPATION IN COGNATE OFFENSE. In all those cases in which a prospective juror has been indicted for an offense of the same character as that charged against the defendant, the offenses being grouped under the same general law, he is incompetent,—as, for example, in cases of a charge of liquor selling.¹ Living in polygamy disqualifies a juror from sitting on a prose-

⁶ *Dumas v. State*, 62 Ga. 58.

⁷ *Pipher v. Lodge*, 16 Serg. & R. (Pa.) 214.

⁸ *R. v. Geach*, 9 Car. & P. 499, 38 Eng. C. L. 294.

⁹ *State v. Stokeley*, 16 Minn. 282.

¹⁰ "Searching questions were put by the defendant's counsel as to his state of mind in reference to the case, and the guilt or innocence of the defendant; and he emphatically declared himself entirely impartial in the case. The presumption is that he told the truth. That he officiated at the funeral in his capacity as a clergyman had, of itself, no more tendency to prove a mental bias against the defendant, than a performance by the undertaker of the duties of his calling on the same

occasion would tend to prove such a bias on his part."—*Ripley, C. J.*, in *State v. Stokeley*, 16 Minn. 282.

¹¹ *Cummings v. Gann*, 52 Pa. St. 484.

Mere business relationship, or even social intimacy, does not, per se, disqualify.—*Cummings v. Gann*, 52 Pa. St. 484.

¹² *Com. v. Joliffe*, 7 Watts (Pa.) 585.

¹³ *Brazleton v. State*, 66 Ala. 96; *Anderson v. State*, 63 Ga. 675; *Com. v. M'Cormick*, 130 Mass. 61, 39 Am. Rep. 423; *People v. McCollister*, 1 Wheeler's Cr. Cas. (N. Y.) 391.

¹⁴ *R. v. Swain*, 2 M. & Rob. 112; see, *infra*, § 1604.

¹⁵ *McGuire v. State*, 37 Miss. 369.

cution for polygamy;² and so, under the federal act of March 22, 1882, does the belief that polygamy is right.³

§ 1598. — AND SO OF PECUNIARY INTEREST IN THE RESULT. A pecuniary interest merely as a member of the town or county to whose treasury a fine is to be paid or from which expenses are to be taken does not incapacitate,¹ nor does a mere speculative or inoperative interest in an institution or corporation which claims to have been injured by the defendants.² It is otherwise, however, when the juror has an individual claim to a fine or forfeiture which a conviction would produce.

§ 1599. — AND SO OF IRRELIGION, INFAMY, INCAPACITY. Where a juror said, when on a jury in another cause in the same term, "that he was a Tom Paine man, and would as lief swear on a spelling-book as on a Bible," this was held a good ground for challenge;¹ and so is a conviction of an infamous crime.² Mental incapacity also disqualifies.³

§ 1600. — AND SO OF CONSCIENTIOUS SCRUPLES AS TO CAPITAL PUNISHMENT. Where a juror, on being called in a capital case, declared "that he had conscientious scruples on the subject of capital punishment, and that he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being the punishment, though the evidence required such a verdict," it was held by the Supreme Court of Pennsylvania a principal cause of challenging by the prose-

² Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244, affirming Reynolds v. United States, 1 Utah 226.

³ Clawson v. United States, 114 U. S. 477, 5 Sup. Ct. 949, 29 L. Ed. 179.

¹ Doyal v. State, 70 Ga. 134; Middletown v. Ames, 7 Vt. 166.

In Pennsylvania, this is the uniform practice.—But see State v. Williams, 30 Me. 484.

² Supra, § 1275.

¹ McFadden v. Com., 23 Pa. St. 12, 62 Am. Dec. 308.

² 1 Inst. 158; Brown v. Crashaw, 2 Bulstr. 154, 2 Hale 277.

³ State v. Rountree, 32 La. Ann. 1144; infra, § 1605.

cution; Gibson, C. J., dissenting.¹ The same opinion is adopted in New York;² even though the juror does not belong to a religious denomination scrupulous on the subject, which seems to have been the qualification of the revised statute;³ in Maine;⁴ in New Hampshire;⁵ in Vermont;⁶ in Indiana;⁷ in Ohio;⁸ in Massachusetts;⁹ in Virginia;¹⁰ in West Virginia;¹¹ in North Carolina;¹² in Georgia;¹³ in Alabama;¹⁴ in Louisiana;¹⁵ in Mississippi;¹⁶ in Texas;¹⁷ in California;¹⁸ in Florida;¹⁹ in Nevada;²⁰ in Nebraska;²¹ in Colorado;²² and in the United States Circuit Court for the eastern district of Pennsylvania, by

¹ *Com. v. Leshner*, 17 Serg. & R. (Pa.) 155.

² *People v. Damon*, 13 Wend. (N. Y.) 351; *Lowenberg v. People*, 27 N. Y. 336, 26 How. Pr. 202; *O'Brien v. People*, 36 N. Y. 276, 36 Abb. Pr. N. S. 368, 2 Trans. App. 5; *Lowenberg v. People*, 5 Park. Cr. Rep. (N. Y.) 414; affirmed 27 N. Y. 336.

³ *People v. Damon*, 13 Wend. (N. Y.) 351; *Walter v. People*, 32 N. Y. 147; *People v. Wilson*, 3 Park. Cr. Rep. (N. Y.) 199.

⁴ *State v. Jewell*, 33 Me. 583.

⁵ *State v. Howard*, 17 N. H. 171.

⁶ *State v. Ward*, 39 Vt. 226.

⁷ *Jones v. State*, 2 Blackf. (Ind.) 475; *Gross v. State*, 2 Ind. 329; *Driskill v. State*, 7 Ind. 338; *Fahnestock v. State*, 23 Ind. 231; *Greenley v. State*, 60 Ind. 141.

⁸ *Martin v. State*, 16 Ohio 364; *State v. Town, Wright* (Ohio) 75.

By the Ohio Code of Cr. Proc., § 134, this is made a statutory cause of challenge.—*Warren's Ohio Cr. Law*, 1870, p. 131.

⁹ Rev. Stat., ch. 137, § 6; Gen. Stat., ch. 172, § 5.

¹⁰ *Clare's Case*, 49 Vt. (8 Gratt.) 606.

¹¹ *State v. Greer*, 22 W. Va. 546.

¹² *State v. Bowman*, 80 N. C. 432.

¹³ *Williams v. State*, 3 Ga. 453.

¹⁴ *Stalls v. State*, 28 Ala. 25; *Jackson v. State*, 74 Ala. 26; *Garratt v. State*, 76 Ala. 21.

¹⁵ *State v. Nolan*, 13 La. Ann. 376; *State v. Baker*, 30 La. Ann. 1134; *State v. Alphonse*, 34 La. Ann. 9; *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448.

¹⁶ *Lewis v. State*, 17 Miss. (9 Smed. & M.) 115; *Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615; *Spain v. State*, 55 Miss. 19; *Cooper v. State*, 55 Miss. 207; *Fortenberry v. State*, 55 Miss. 403; *Smith v. State*, 55 Miss. 410.

¹⁷ *Burrell v. State*, 18 Tex. 713; *Clanton v. State*, 13 Tex. App. 139; *Thompson v. State*, 19 Tex. App. 594; *Kennedy v. State*, 19 Tex. App. 618.

¹⁸ *People v. Tanner*, 2 Cal. 257.

¹⁹ *Melzgar v. State*, 18 Fla. 481.

²⁰ *State v. Pritchard*, 16 Nev. 101; *State v. Hing*, 16 Nev. 307.

²¹ *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 351; *Hill v. State*, 42 Neb. 503, 60 N. W. 916; *Rhea v. State*, 63 Neb. 472, 88 N. W. 792.

²² *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *Demato v. People*, 49 Colo. 149, 111 Pac. 704.

Baldwin, J.²³ Nor is the disqualification in such cases removed by the fact that the jurors have by statute the option of reducing the punishment to imprisonment for life.²⁴ But when, notwithstanding objections to capital punishment, the juror thinks he could do justice in the case, he may be competent.²⁵

In Arkansas, jurors are not rejected because they are opposed to capital punishment, unless they go further, and bring themselves under the disqualifications prescribed by the statute.²⁶

In Alabama, the exclusion is extended to scruples as to penitentiary punishment.²⁷ The defendant has no ground of complaint if a juror having such conscientious scruples should not be set aside.²⁸

In Indiana, the rule in text is prescribed by statute.²⁹

§ 1601. — AND SO OF OTHER CONSCIENTIOUS SCRUPLES. Any other conscientious scruples which will prevent a just verdict may be ground for challenge. Thus, a juror is incompetent who declares that no amount of circumstantial evidence would induce him to find a verdict of guilty,¹ and so of a juror called in a polygamy case, who believes that polygamy is divinely prescribed.² And on the trial of a nuisance for erecting a mill-dam, a juror is incompetent who conscientiously believes all mill-dams

²³ United States v. Wilson, 1 Bald. 78, Fed. Cas. No. 16730.

²⁴ Spain v. State, 55 Miss. 191.

²⁵ People v. Stewart, 7 Cal. 140; Stratton v. People, 5 Colo. 276; Com. v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711; Williams v. State, 32 Miss. 389, 66 Am. Dec. 615.

²⁶ Dig., § 158, ch. 2; Atkins v. State, 16 Ark. 568.

²⁷ Stalls v. State, 28 Ala. 25.

²⁸ Murphy v. State, 37 Ala. 25.

²⁹ Greenley v. State, 60 Ind. 141.

¹ ALA.—Smith v. State, 55 Ala. 1; CAL.—People v. Ah Chung, 54

Cal. 398. ILL.—Gates v. People, 14 Ill. 433. MISS.—Jones v. State, 57 Miss. 424; Coleman v. State, 59 Miss. 484. NEV.—State v. Pritchard, 15 Nev. 74.

In Garrett v. State, 76 Ala. 18, a juror was held incompetent who said he would convict, but would not hang on circumstantial evidence.

Mere prejudice against circumstantial evidence does not disqualify.—State v. Shields, 33 La. Ann. 991.

² United States v. Miles, 103 U. S. 304, 26 L. Ed. 481.

to be nuisances, though he swears that as to such particular mill-dam he knows nothing, and has formed no opinion.³

It has been also ruled that it is a good ground for challenge that the juror held that the offense for which the accused was to be tried (burning a convent) is no crime,⁴ and so in Pennsylvania, as to a juror who declared in a prior case that he would acquit any one the judge wanted him to convict.⁵

The prosecuting officer may inquire of a person presented as a juror in the trial of a case of counterfeiting, whether he has taken an oath to acquit all persons of counterfeiting, but the person may refuse to answer;⁶ and in a case in which a Chinese is defendant, a juror may be asked whether he has a prejudice against Chinese witnesses.⁷

§ 1602. — AND SO OF BELIEF THAT STATUTE IS UNCONSTITUTIONAL. Belief that a statute is unconstitutional, so as to preclude assent to a conviction under it, disqualifies;¹ but the converse is not true, for a statute is presumed to be constitutional until otherwise determined by the court.²

§ 1603. "FREEMASONRY" DOES NOT EXCLUDE. In New York it has been held to be no cause of challenging a juror that he is a freemason, where one of the parties to a suit is a freemason, and the other is not.¹ In the

³ Crippin v. State, 8 Mich. 117.

⁴ Com. v. Buzzell, 33 Mass. (16 Pick.) 153.

⁵ Com. v. McFadden, 23 Pa. St. 12, 62 Am. Dec. 308.

⁶ Com. v. Eagan, 70 Mass. (4 Gray) 18; Fletcher v. State, 25 Tenn. (6 Humph.) 249; supra, § 1590.

⁷ People v. Car Soy, 57 Cal. 102; People v. Hon Tin, 57 Cal. 142.

Dicta in the Car Soy case dis-

approved in People v. Hamilton, 62 Cal. 382.

Prejudice against negro is to same effect.—See Pinder v. State, 27 Fla. 370, 28 Am. St. Rep. 78, 8 So. 837.

¹ Com. v. Austin, 72 Mass. (7 Gray) 51.

² Com. v. Abbott, 54 Mass. (13 Met.) 120.

¹ People v. Horton, 13 Wend. (N. Y.) 9, 27 Am. Dec. 167. See

obligation, it was observed, assumed by a royal arch mason, and said to be in these words: "I promise and swear that I will aid and assist a companion royal arch mason when engaged in any difficulty, and espouse his cause so far as to extricate him from the same, if in my power, whether he be right or wrong," there is a discrepancy in the relation given of it by masons; while some say that such is the form of the oath, others deny it; but all concur in stating that the obligation is always accompanied with an explanation as to its meaning, which is, that if a royal arch mason sees a brother mason engaged in a quarrel with another person, it is his duty to take his brother mason by the arm and extricate him, without inquiring into the merits of the controversy. On such an interpretation, the oath taken by a master mason, or a royal arch mason, on his admission, it was ruled, does not disqualify him from serving as a juror in an action between a mason and a person not a mason.² The same is true as to Odd Fellows,³ and other similar fraternal or social organizations,⁴ or societies formed for the suppression of crime,⁵ but is otherwise as to secret societies prejudiced against foreigners.⁶

Burdin v. Grand Lodge of Alabama, 37 Ala. 478.

² *People v. Horton*, 13 Wend. (N. Y.) 9, 27 Am. Dec. 167.

³ *Reed v. Peacock*, 123 Mich. 244, 81 Am. St. Rep. 194, 49 L. R. A. 423, 82 N. W. 53.

⁴ As church members.—See *Barton v. Erickson*, 14 Neb. 164; *United States v. Miles*, 2 Utah 19 (on trial of a Mormon for polygamy).

⁵ COLO.—*Boyle v. People*, 4 Colo. 176, 34 Am. Rep. 76. GA.—*Williams v. State*, 3 Ga. 453; *Parker v. State*, 34 Ga. 262. ILL.—

Musick v. People, 40 Ill. 268. IOWA—*State v. Willson*, 8 Iowa 407. MASS.—*Com. v. Livermore*, 70 Mass. (4 Gray) 18; *Com. v. O'Neill*, 72 Mass. (6 Gray) 343; *Com. v. Thrasher*, 77 Mass. (11 Gray) 55. R. I.—*State v. Hoxsle*, 15 R. I. 1, 2 Am. St. Rep. 838, 22 Atl. 1059. TEX.—*Heacock v. State*, 13 Tex. App. 97. FED.—*United States v. Noelke*, 17 Blatchf. 554, 1 Fed. 426; *United States v. Hanway*, 2 Wall. Jr. 139, Fed. Cas. No. 15299.

But see discussion and cases cited *infra*, § 1614.

⁶ *People v. Reyes*, 5 Cal. 347.

§ 1604. MEMBERSHIP OF SPECIFIC "VIGILANCE" ASSOCIATION, OR PROSCRIPTIVE ORGANIZATION, MAY DISQUALIFY, BUT NOT OF GENERAL ASSOCIATIONS TO PUT DOWN CRIME. The members of any association of men, combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for that purpose, are incompetent to sit as jurors on the trial of an indictment for violating that law,¹ and it has been held error in Illinois to refuse, on a prosecution for selling spirituous liquor, to permit the following questions to be put: "Are you a member of a temperance society?" "Are you connected with any society or league organized for the purpose of prosecuting a certain class of people under what is called the new temperance law of the state, or have you ever contributed any funds for such a purpose?"² It has also been held error to refuse to permit a juror to be asked whether he belonged to any secret society binding its members by oath not to give a fair trial to foreigners.³ But members of an association to prosecute offenses against certain laws, who have each, by subscribing a certain sum to the funds of the association, rendered themselves liable to pay, to the extent of their subscriptions, their proportion of expenses incurred in such prosecutions, are not incompetent to sit as jurors on the trial of such a prosecution, commenced by the agent of the association, and carried on at its expense, if it appear that they paid their subscriptions before the prosecution was commenced.⁴ And it has been held that a juror is not rendered incompetent by the fact that he belongs to an

¹ *Com. v. Egan*, 70 Mass. (4 Gray) 18. See, *supra*, § 1559.

² *Lavin v. People*, 69 Ill. 303.

Rulings may be harmonized with the following by the distinction suggested by the Illinois court, that such questions are proper at least to enable the defendant to

exercise his right of peremptory challenge.

³ *People v. Reyes*, 5 Cal. 347.

⁴ *Williams v. State*, 3 Ga. 453; *Com. v. O'Neill*, 72 Mass. (6 Gray) 343; *Com. v. Thrasher*, 77 Mass. (11 Gray) 55; *Heacock v. State*, 13 Tex. App. 97.

association for prosecution of crimes of the same class as that under trial.⁵

Connection with the police is by itself no disqualification.⁶

To a grand juror it is no cause for challenge that he belongs to an association for the prosecution of crime.⁷

A bias or prejudice against crime generally, or against the crime on trial, is no disqualification.⁸

iii. Alienage, Non-Residence or Ignorance of Language.

§ 1605. ALIENAGE, NON-RESIDENCE, IGNORANCE OF THE LANGUAGE, AND DRUNKENNESS. In those jurisdictions where alienage or non-residence is a disqualification, the objection is good if made by way of challenge. After verdict it may be too late to state such objection when the disqualification is one which due diligence would have discovered, and which is not moral but technical.¹ Ignorance of the English language is a ground for challenge when the jury can be made up of persons familiar with the language.²

⁵ Boyle v. People, 4 Colo. 176, 34 Am. Rep. 76; State v. Wilson, 8 Iowa 407.

⁶ People v. Reynolds, 16 Cal. 128.

⁷ Musick v. People, 40 Ill. 268. See R. v. Swain, 2 Mann. & Ry. 112.

⁸ Williams v. State, 3 Ga. 453; State v. Burnes, 85 Mo. 47; supra, § 1559.

As to conscientious objections to polygamy, see United States v. Reynolds, 1 Utah 226; United States v. Reynolds, 98 U. S. 145, 25 L. Ed. 244.

¹ See, infra, § 1786. KAN.—State v. Hinkle, 27 Kan. 308. KY.—Presbury v. Com., 39 Ky. (9 Dana) 203; Raganthall v. Com., 77 Ky. (14 Bush) 457. LA.—State v.

Nolan, 13 La. Ann. 276. MISS.—Seal v. State, 21 Miss. (13 Smed. & M.) 286. TEX.—Yanez v. State, 6 Tex. App. 429, 32 Am. Rep. 591. W. VA.—Sweeney v. Baker, 13 W. Va. 156. WIS.—Schumaker v. State, 5 Wis. 324. ENG.—R. v. Sutton, 8 Barn. & C. 417, 15 Eng. C. L. 208; R. v. Despard, 2 Man. & Ry. 406, 17 Eng. C. L. 716.

² ALA.—State v. Marshall, 8 Ala. 302. MINN.—State v. Ring, 29 Minn. 78, 11 N. W. 233. PA.—Fisher v. Phila., 4 Brewst. 375; Com. v. Jones, 12 Phila. 550. TEX.—Lyles v. State, 41 Tex. 172, 19 Am. Rep. 38; Dunn v. State, 7 Tex. App. 600; Wright v. State, 12 Tex. App. 163; Garcia v. State, 12 Tex. App. 335. WIS.—Sutton v. Fox,

Drunkenness, also, may be ground for challenge.³

c. Challenges to Polls for Favor.

§ 1606. CHALLENGES FOR FAVOR ARE THOSE INVOLVING DISPUTED QUESTIONS OF FACT. Challenges to the polls for favor take place when, though the juror is not so evidently partial as to amount to a principal challenge, there are reasonable grounds to suspect that he will act under some undue influence or prejudice, and when these grounds involve disputed questions of fact, such challenges, according to the old practice, being submitted to triers on the questions of disputed fact.¹ The distinction, how-

55 Wis. 531, 42 Am. Rep. 744, 13 N. W. 477; *Bonneville v. State*, 53 Wis. 680, 11 N. W. 427.

Court may take notice of such disqualification.—See, *infra*, § 1619.

In *Trinidad v. Simpson*, 5 Colo. 65, we have the following from Elbert, J.: "We are not unmindful that there are many serious objections to the interposition of interpreters in judicial proceedings, and while we hold it within the power of the court to appoint an interpreter under the circumstances of this case, it was also within its discretion to exclude the jurors named from the cause assigned."—Citing *State v. Marshall*, 8 Ala. 302; *People v. Arceo*, 32 Cal. 49; *Atlas M. Co. v. Johnson*, 23 Mich. 37.

"Such persons are not disqualified, but whenever it is practicable to secure a full panel of English-speaking jurors, a wise discretion would excuse from jury duty persons ignorant of that language." The cases of *Fisher v. Philadelphia*, 4 Brewst. (Pa.) 375, and *Lyles v. State*, 41 Tex. 172, 19 Am. Rep.

38, are cited against the conclusion arrived at in this opinion.

"The first authority we have been unable to obtain. With the reasoning of the last we are not satisfied. If our conclusion as to the power of the court to appoint an interpreter be correct, the foundation upon which the conclusions in that case appear to rest disappears."

This can only hold good, however, in cases where the panel can in no other way be constituted; and even in such cases it is hard to see how the deliberations can be conducted of a jury who have no common language. To put an interpreter in with them would be to make the interpreter the arbiter.

³ *Supra*, § 1599; *infra*, § 1781; *Guice v. State*, 60 Miss. 714.

Court may in such cases excuse.—See, *infra*, § 1619.

¹ *Infra*, § 1622; *supra*, § 1556; Co. Lit. 157b; Bac. Abr. Juries, E. 5; Williams', J., Juries, v; Dick. Sess. 188. See, also, *People v. Bodine*, 1 Den. (N. Y.) 9, 35, 281; *Freeman*

ever, between challenges for favor and those for principal cause is in many jurisdictions disregarded. Thus, in the federal courts, it is settled law that when a challenge for favor would be sustained, a court of error will not reverse because the challenge was in form for cause.² Consequently, what has been already said under the head of challenges for principal cause is to be examined as connected with challenges for favor.³

The fact, however, that in some jurisdictions all challenges are decided by the court, without the intervention of triers, does not do away with the distinction between the two classes.⁴ The question, in challenges for favor, is, whether the jurymen is altogether indifferent as he stands unsworn,⁵ because he may be, even unconsciously to himself, swayed to one side, and indulge his own feelings when he considers himself influenced entirely by the weight of evidence;⁶ or may be under such influences, indirect or direct, as to create in him a bias to one or the other side.⁷

v. *People*, 4 Den. (N. Y.) 39; *State v. Benton*, 19 N. C. (2 Dev. & B. L.) 212; *Schoeffler v. State*, 3 Wis. 823.

² *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244.

³ See, *supra*, § 1556.

⁴ *State v. Howard*, 17 N. H. 171; *Greenfield v. People*, 6 Abb. N. C. (N. Y.) 1, reversing 1 Hun 212.

⁵ *People v. Horton*, 13 Wend. (N. Y.) 8.

⁶ *Ibid*.

⁷ See, fully, *supra*, § 1556; and see *Co. Lit.* 157; *Bac. Abr. Juries*, E. 5; *Burn's, J., Juries*, iv 1; *Williams', J., Juries*, v; *State v. Mann*, 83 Mo. 589.

Challenges for "bias," properly speaking, in the English practice,

fall under the present head, though they have necessarily been considered, from circumstances connected with our distinctive American practice, under the title of Principal Challenges. The reason of this confusion of nomenclature is to be traced to the circumstance that the question of preconceived opinion or prejudice on the juror's part, as a mere matter of opinion, is examined into in England as a conclusion of law, to be drawn from certain conditions (e. g., that the juror and the defendant are intimate friends), while with us it is treated as an independent objective fact, capable of determination by a personal examination of the juror under oath.—See, *supra*, § 1556.

§ 1607. CHALLENGES CAN NOT MOOT QUESTIONS OF MERE PERSONAL PRIVILEGE TO JUROR. As will hereafter be more fully seen,¹ persons to be affected by the finding of jurors may object to their fitness, but have nothing to do with the question whether the juror is privileged from acting as such. Whether a person is privileged on account of his age comes under the latter class of questions.²

The court may excuse a juror on ground of exemption without the prisoner's consent.³

III. MODE AND TIME OF TAKING CHALLENGES.

§ 1608. CHALLENGE MUST BE PRIOR TO OATH. The order in which challenges are to be made is, as we have seen, a matter of local practice, sometimes settled by statute.¹ The challenge, either by the prosecution or the defense, must be before the oath is commenced, down to which period the right exists;² and the usual course is to make the challenges separately, as the jurors are called and

¹ *Infra*, § 1627.

² *Breeding v. State*, 11 Tex. 257, and cases cited *infra*, § 1627.

³ *Spigener v. State*, 62 Ala. 383; *Jesse v. State*, 20 Ga. 156.

¹ *Supra*, § 1547. See *Spigener v. State*, 62 Ala. 383; *State v. Steeley*, 65 Mo. 218, 27 Am. Rep. 271.

² *Supra*, § 1552. ALA.—*Powell v. State*, 48 Ala. 154; *Murray v. State*, 48 Ala. 675; *Drake v. State*, 51 Ala. 30; *Battle v. State*, 54 Ala. 93; *Henry v. State*, 77 Ala. 75; *Williams v. State*, 81 Ala. 1, 1 So. 179. CAL.—*People v. Kohle*, 4 Cal. 198; *People v. Jenks*, 24 Cal. 11; *People v. Coffman*, 24 Cal. 230; *People v. Sanford*, 43 Cal. 29; *People v. Samsels*, 66 Cal. 99, 4 Pac. 1061. GA.—*Williams v. State*, 3 Ga. 453. IND.—*Munly v. State*, 7 Blackf. 593; *Morris v. State*, 7 Blackf. 607. LA.—*State v. Harris*,

30 La. Ann. 90. MINN.—*State v. Armington*, 25 Minn. 29. NEV.—*State v. Larkin*, 11 Nev. 314. N. C.—*State v. Patrick*, 56 N. C. (3 Jones L.) 443; *State v. Vestal*, 82 N. C. 563; *State v. Varn*, 82 N. C. 631. WASH.—*Clarke v. Terr.*, 1 Wash. Ter. 82.

Even if the juror has been accepted, this does not preclude his challenge.—*People v. Montgomery*, 53 Cal. 576.

Compare: *Drake v. State*, 5 Tex. App. 649.

Rule by trial court that state should exercise one of its peremptory challenges, and then the defendant should exercise two of his, and so on alternately, was held not error (the state having by statute six peremptory challenges and the defendant twelve).—*State v. Bailey*, 32 Kan. 83, 3 Pac. 769.

appear.³ The moment the oath is begun it is, in ordinary cases, too late.⁴ The oath is begun by the juror taking the book, having been directed by the officer of the court to do so; but if he take the book without authority, neither party wishing to challenge is prejudiced thereby.⁵ The rule, however, rests on the supposition that the defendant, when the objection is raised by him, had the opportunity of discovering the juror's bias before the oath was administered. If he has no such opportunity, the objection may be taken after the oath;⁶ and when such bias is discovered after verdict, it is, as will presently be seen, ground for new trial.⁷ Such being the case, when the party discovers such disqualification subsequent to oath but before opening the case, the objection should be allowed by the court. Hence it has been ruled that after a juror has been sworn in chief, and taken his seat, if it be discovered that he is incompetent to serve, he may, in the exercise of a sound discretion, be set aside by the court at any time before evidence is given,⁸ and this may be done even in a capital case, and as well for cause existing before as after the juror was sworn,⁹ though as a general

³ *Smith v. State*, 61 Miss. 754.

⁴ *People v. Dolan*, 51 Mich. 610, 17 N. W. 78.

⁵ ALA.—*Rash v. State*, 61 Ala. 89. MASS.—*Com. v. Knapp*, 27 Mass. (10 Pick.) 477, 20 Am. Dec. 534. NEV.—*See State v. Pritchard*, 16 Nev. 101. TENN.—*McClure v. State*, 9 Tenn. (1 Yerg.) 206. ENG.—*R. v. Giorgetti*, 4 F. & F. 546.

⁶ *Supra*, § 1552. *See State v. Allen*, 46 Conn. 531; *Com. v. Twombly*, 27 Mass. (10 Pick.) 480; *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308; *Evans v. State*, 6 Tex. App. 513; *Hendrick v. Com.*, 32 Va. (5 Leigh) 708.

⁷ *Infra*, § 1784.

⁸ *Infra*, §§ 1619, 1657; *Wesley v. State*, 65 Ga. 731; *State v. Diskins*, 34 La. Ann. 919, 44 Am. Rep. 448; but *see Ellison v. State*, 12 Tex. App. 557.

⁹ MISS.—*McGuire v. State*, 37 Miss. 369. N. Y.—*People v. Damon*, 13 Wend. 351; *People v. Bodine*, 1 Edm. Sel. Cas. 36. PA.—*Com. v. McFadden*, 23 Pa. St. 12, 62 Am. Dec. 308. VA.—*Tooele v. Com.*, 38 Va. (11 Leigh) 714; *Dilworth v. Com.*, 53 Va. (12 Gratt.) 689, 65 Am. Dec. 264; *Bristow v. Com.*, 56 Va. (15 Gratt.) 634. FED.—*United States v. Morris*, 1 Curt. 23, Fed. Cas. No. 15815.

As to the withdrawal of jurors, *see, infra*, §§ 1759, 1784 et seq.

rule it is too late, after the jury is empanelled, to inquire into the impartiality of a juror.¹⁰

§ 1609. WHEN FOR FAVOR MUST SPECIFY REASONS. A challenge for favor or bias must specify the specific reasons of objection. It is not enough to challenge for "bias." The kind of bias must be stated.¹

§ 1610. JUROR MUST BE SWORN ON VOIR DIRE. The correct practice is, immediately after the juror is challenged, to swear him on his voir dire, as a condition precedent to his examination.¹ The form of oath to the juror on the voir dire is as follows: "You shall true answer make to all such questions as the court shall demand of you. So help you God." The questions to be put to the juror have been already noticed.² In some jurisdictions the examination is by the court.³ The answers are not final, but may be traversed.⁴

§ 1611. PASSING OVER TO COURT NO WAIVER. It is no waiver of the right to challenge for cause for the defendant to pass the juror over to the court, or to the opposite side for examination.¹

§ 1612. AFTER PRINCIPAL CHALLENGE IS DISALLOWED, THERE MAY BE CHALLENGE FOR FAVOR. The mere fact of a juror purging himself from disqualification on his voir dire does not preclude the party questioning him from

¹⁰ *Gillooley v. State*, 58 Ind. 182; *State v. Harris*, 30 La. Ann. 90; *Com. v. Knapp*, 27 Mass. (10 Pick.) 477, 20 Am. Dec. 534; *Ward v. State*, 20 Tenn. (1 Humph.) 253.

¹ *People v. Renfrow*, 41 Cal. 37; *People v. McGungill*, 41 Cal. 429; *People v. Buckley*, 49 Cal. 241.

¹ *Supra*, §§ 1589, 1590; *infra*, § 1618.

² *Supra*, § 1621.

Sick juror may be discharged and a new juror called in his
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place, under a local statute; this revives the defendant's right of challenge, although previously exhausted.—*People v. Stewart*, 64 Cal. 60, 28 Pac. 112.

³ *Ibid.*; *State v. Coleman*, 20 S. C. 441.

⁴ *Infra*, § 1624; *State v. Barnes*, 34 La. Ann. 395.

¹ *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308; *Hendrick v. Com.*, 32 Va. (5 Leigh) 708; and see, *supra*, §§ 1552, 1553.

challenging him for favor, and producing evidence before the court or the triers, as the practice may be, to disprove his testimony. Otherwise, an incompetent juror could qualify himself by adding perjury to his other disqualifications.¹

§ 1613. PEREMPTORY CHALLENGE MAY BE MADE AFTER CHALLENGE FOR CAUSE. We have already seen,¹ that it is doubted whether a defendant can make a peremptory challenge after he has passed the juror over to the court or to the prosecution; though the better opinion is that on due cause shown the right may be exercised at any period down to the completion of the panel. But the better opinion is that the defendant has the right of peremptory challenge to a juror after he has made such answers on the voir dire as do not authorize a challenge for cause,² though by high authority this has been questioned.³

§ 1614. CHALLENGES MAY BE MADE BY COUNSEL. It has been said that the defendant must personally, and not

¹ State v. Mann, 83 Mo. 589; People v. Bodine, 1 Den. (N. Y.) 281, 1 Edm. Sel. Cas. 36; Freeman v. People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; Carnal v. People, 1 Park. Cr. Rep. (N. Y.) 262, 273, 2 Edm. Sel. Cas. 208; Heath v. Com., 39 Va. (1 Rob.) 796.

Compare: Com. v. Wade, 34 Mass. (17 Pick.) 395.

A juror's answers on a challenge for favor are not admissible on a challenge for principal cause; but when a challenge for principal cause and that for favors are tried successively by the court, the answers on the trial for principal cause may be referred to on the trial of the challenge for favor.

—Greenfield v. People, 6 Abb. N. C. 1, 74 N. Y. 277.

Peremptory challenge after refusal of challenge for cause, cures any error in court's ruling disallowing the challenge for cause.—People v. Larubia, 140 N. Y. 87, 10 N. Y. Cr. Rep. 549, 35 N. E. 412.

¹ Supra, § 1552.

² See cases cited supra, §§ 1552, 1609; and see Co. Lit. 158a; 4 Black Com. 363; 2 Hawk., ch. 43, § 10; Bac. Abr. Juries, E. 11. See, also, State v. Potter, 18 Conn. 166; People v. Bodine, 1 Den. (N. Y.) 281; Hooker v. State, 4 Ohio 350; Hoobach v. State, 43 Tex. 242; R. v. Stone, 6 T. R. 527, 531, 101 Eng. Repr. 684, 686.

³ Com. v. Rogers, 48 Mass. (7 Met.) 500, 41 Am. Dec. 458.

through counsel, make such challenges as are peremptory.¹ This, however, is a mere arbitrary and forced extension of the fiction of the jurymen and prisoner looking on each other, to see if there is any personal reminiscence which would touch the question of indifference. The usual practice is for this kind of challenge, as is the case with all others, to be made by counsel.

§ 1615. IN CASES OF SURPRISE PEREMPTORY CHALLENGE MAY BE RECALLED. It is said that the court, in its discretion, will not permit a peremptory challenge to be recalled, after the jurymen are set aside, in order merely to admit a challenge for cause.¹ But in case of surprise such discretion may be properly invoked.

§ 1616. ONE DEFENDANT CAN NOT OBJECT TO CHALLENGE OF CO-DEFENDANT. While in some jurisdictions joint defendants are limited to a single set of challenges,¹ yet where this limitation does not obtain, the right to challenge a juror, as has been observed, is a right to reject, not to select; and therefore neither of two defendants in

¹ State v. Price, 10 Rich. L. (S. C.) 351.

¹ State v. Lautenschlager, 22 Minn. 514; State v. Price, 10 Rich. L. (S. C.) 351; State v. Coleman, 8 S. C. 237; see R. v. Parry, 7 Car. & P. 836, 32 Eng. C. L. 898.

See, supra, § 1554.

In Connecticut, B., having been called as a talesman, and examined as to his bias, and no reason to except to him appearing, the counsel for the prisoner were informed by the court that they could then challenge B. peremptorily if they desired to do so. They declined to exercise the right at that time, as the panel was not then full; and B. was

directed to take his seat as one of the jurors. After the panel was full, and but six peremptory challenges had been made, the prisoner's counsel claimed the right to challenge B. peremptorily. It was held that in the absence of any reason for a peremptory challenge then, which did not exist before, when the exercise of the right was declined, it was too late to challenge B. peremptorily.—State v. Potter, 18 Conn. 168. See State v. Cameron, 2 Chand. (Wis.) 172.

Compare: Hendrick v. Com., 32 Va. (5 Leigh) 708.

See, supra, § 1552.

¹ Supra, § 1549.

an indictment on a joint trial has cause to complain of a challenge by the other.²

§ 1617. JUROR INDIFFERENT ON ONE SIDE MAY BE CHALLENGED BY OTHER. If a juror be challenged on one side and be found indifferent, he may still be challenged on the other side.¹

§ 1618. JUROR MAY BE CROSS-EXAMINED AND CONTRADICTIONED. The juror, as has been seen, may be examined under oath as to his qualifications; though he is not to be so examined when the question involves disgrace.¹ He is of course subject to cross-examination by the party opposing the challenge,² and to traverse.³

§ 1619. COURT MAY OF ITS OWN MOTION EXAMINE AND EXCUSE. As has been already seen, the court, of its own motion, without the suggestion of either party, may examine upon oath all who have been summoned to serve upon the jury, touching any disability, such as infancy, infamy, want of freehold or property qualifications, or, in a capital case, conscientious scruples on the subject of capital punishment, or similar incapacity, and upon any such disability being thus made to appear, may set aside

² ALA.—*Brister v. State*, 26 Ala. 107. ILL.—*Matow v. State*, 15 Ill. 536. N. H.—*State v. Doolittle*, 58 N. H. 92. N. C.—*State v. Smith*, 24 N. C. (2 Ired. L.) 402. OHIO—*Bixbe v. State*, 6 Ohio 86. VT.—*State v. Meaker*, 54 Vt. 112. FED.—*United States v. Marchant*, 25 U. S. (12 Wheat.) 480, 6 L. Ed. 700; *United States v. Marchant*, 4 Mas. 158, Fed. Cas. No. 16682.

See, *supra*, § 1555.

¹ Co. Lit. 158a; Bac. Abr. Juries, E. 16; 1 Ch. C. L. 545.

Where prosecution passes the jury without challenge to the defendant, declining to exercise any challenge, and the defendant ex-

ercises his right of peremptory challenge by objecting to one juror, the action of the court in subsequently permitting the prosecution to peremptorily challenge a juror is not ground for reversal.—*People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597.

¹ *Supra*, § 1589.

² *People v. Bodine*, 1 Den. (N. Y.) 281; *People v. Knickerbocker*, 1 Park. Cr. Rep. (N. Y.) 302; *Howser v. Com.*, 51 Pa. St. 333; *Heath v. Com.*, 40 Va. (1 Rob.) 735; *Cook's Case*, 13 How. St. Tr. 312.

³ *Infra*, §§ 1622 et seq.; *State v. Barnes*, 34 La. Ann. 395.

any such juror of its own action, without objection made by either party.¹ And the court, of its own motion, without the suggestion or consent of either party, may excuse or set aside a juror who, though in all other respects competent, is disabled physically or mentally by disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing, or other like cause, from properly performing the duties of a juror.² But the erroneous exercise of this power is a matter of exception by the defendant, for which, in an extreme case of abuse, the judgment of the court may be reversed.³ And when both parties accept a juror he can not be stricken off by the court, except on grounds of absolute unfitness or incompetency.⁴

IV. HOW CHALLENGES ARE TO BE TRIED.

§ 1620. AT COMMON LAW, AT DISCRETION OF COURT. If the array be challenged, the mode of trial is at common law

¹ *Infra*, § 1627; *supra*, § 1607.
 LA.—*State v. Diskins*, 34 La. Ann. 919, 44 Am. Rep. 448. MISS.—*McCarty v. State*, 26 Miss. 299; *Coleman v. State*, 59 Miss. 484; *State v. Guice*, 60 Miss. 714. N. H.—*State v. Howard*, 17 N. H. 171. N. Y.—*People v. Christie*, 2 Park. Cr. Rep. 579. N. C.—*State v. Boone*, 80 N. C. 461. W. VA.—*State v. Henderson*, 29 W. Va. 147, 1 S. E. 225. FED.—*United States v. Blodgett*, 35 Ga. 336, Fed. Cas. No. 14611.

In Massachusetts the right of propounding questions is for the court exclusively, and not for parties.

² Whenever the incompetency is exhibited to the court, no matter how far the cause may have progressed, the court may set aside the juror. See, *supra*, §§ 1605, 1611; *infra*, § 1657. See, also:

ALA.—*State v. Marshall*, 8 Ala. 302. GA.—*Jesse v. State*, 20 Ga. 156. MASS.—*Com. v. Hayden*, 70 Mass. (4 Gray) 18. MICH.—*Stephen v. People*, 38 Mich. 739; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487. MO.—*State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314. OHIO.—*Stewart v. State*, 1 Ohio St. 66. TEX.—*Breeding v. State*, 11 Tex. 257. VA.—*Montague v. Com.*, 51 Va. (10 Gratt.) 767.

See, also, authorities *supra*, §§ 1605, 1607; *infra*, §§ 1627, 1628.

³ *Montague v. Com.*, 51 Va. (10 Gratt.) 767.

But to reverse, the cause must be one of oppression to the defendant.—*Stratton v. People*, 5 Cal. 276; *People v. Lee*, 17 Cal. 76; *State v. Ostrander*, 18 Iowa 435; *infra*, §§ 1627, 1628.

⁴ *Greer v. People*, 14 Tex. App. 149, citing *People v. Mather*, 4 Wend. (N. Y.) 231.

at the discretion of the court.¹ The trial sometimes is by two coroners, and sometimes by two of the jury; with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge be for favor or partiality, then by any other two assigned thereunto by the court.² Upon a challenge to the array, the persons making the challenge must be prepared strictly to prove the cause.³

§ 1621. AS TO ARRAY, TRIERS ARE APPOINTED ON ISSUES OF FACT; OTHERWISE WHEN THERE IS DEMURRER. When the array is thus challenged, the opposite party may either plead to it, or demur to its sufficiency in law.¹ If he plead, then the triers are sworn and charged to inquire "whether it be an impartial array or a favorable one"; if they affirm it, the clerk enters under it, "affirmatur"; but if

¹ As limiting this discretion, see *People v. Nellson*, 22 Hun (N. Y.) 1.

² 2 Hale 275. *Supra*, § 1542.

³ *R. v. Savage*, 1 Mood. C. C. 51. *Supra*, § 1544.

In New York, by the Act of May 7th, 1873, "all challenges of jurors, both in civil and criminal cases, shall be tried and determined by the court only," but to the action of the court exceptions may be taken by writ of error or certiorari. See, *supra*, § 1567.

In Ohio, by the Code of Criminal Procedure, "all challenges for cause shall be tried by the court on the oath of the person challenged, or on other evidence, and such challenge shall be made before the jury is sworn and not afterward."

In Pennsylvania trial is by statute assigned to the court.—Rev. Act Bill II, § 39.

In the United States courts, triers are dispensed with.—Act of March 3, 1865, § 2. See Rev. Stat.

U. S., § 1031, 2 Fed. Stats. Ann., 1st ed., p. 335.

A challenge to the array should be in writing, so that it may be put upon the record, and the other party may plead or demur to it; and the cause of challenge must be stated specifically.—*R. v. Hughes*, 1 Car. & K. 235, 519, 47 Eng. C. L. 518.

"When the opposite party pleads to the challenge, two triers are appointed by the court; either two coroners, two attorneys, or two of the jury, or indeed any two indifferent persons. If the array be quashed against the sheriff, a venire facias is then directed instanter to the coroner; if it be further quashed against the coroner, it is then awarded to two persons, called elisors, chosen at the discretion of the court, and it can not be afterwards quashed.—Co. Lit. 158a." *Roscoe's Cr. Ev.*, p. 208.

¹ See forms, 10 Wentw. 474.

they find it to be partial, the words "calumnia vera" are entered on record.² The court may either decide the demurrer at once, or adjourn its consideration to a future period.³ Where the judges, upon hearing the arguments, overrule the challenge, the decision is entered on the original record, and at nisi prius appears on the postea; but if it is overruled without demurrer on being debated, the objections may afterwards be made the subject of a bill of exceptions.⁴ Should the challenge be admitted, and the array be quashed, a new venire is awarded the coroners or elisors, in the same manner as if it had been prayed by one of the parties to be so directed, to prevent the delay at an earlier stage of the proceedings.⁵

§ 1622. AT COMMON LAW, ON CHALLENGES TO THE POLL, TRIERS ARE APPOINTED BY COURT. In many states, as has been seen, challenges to the polls are tried by the court.¹ In others statutory provisions exist allowing triers. In others, the court, at common law, chooses the triers; if two are sworn, they then try;² and if they try one indifferent, and he be sworn, then he and the two triers try another; and if another be tried indifferent, and he be sworn, then the two triers cease, and the two that be sworn on the jury try the rest.³

² 4 Black. Com., 353, n. 8; Bac. Abr. Juries, E. 12; 1 Ch. C. L. 549.

In the New England States challenges to the array are usually tried by the court.—Com. v. Walsh, 124 Mass. 32.

³ Ibid.

⁴ 1 Ch. C. L. 549; Bac. Abr. Juries, E. 12.

⁵ Co. Lit. 158a.

¹ In North Carolina this is the case.—State v. Kilgore, 93 N. C. 533.

² McGuffie v. State, 17 Ga. 497.

³ Supra, § 1606; Finch. 112; 1 Inst. 158, Co. Lit. 158a; 2 Hale 275; Bac. Abr. Juries, E. 12;

Burn's J., Jurors, iv 3; Williams' J., Juries, v; Dick. Sess. 190.

"If the party pleads to the challenge" (Archbold's C. P., 17th ed. (1871), p. 154), "two triers are (in the case, at least, of a challenge for favor, and also, it would seem, in the case of a principal challenge, unless the fact be admitted or apparent) appointed by the court, who are sworn, and charged to try whether the array be an impartial or favorable one. See O'Brien v. R., 2 Ho. Lords Cas. 465. These triers are generally two of the jurymen returned. The court may, however, in its discre-

tion, refer the trial to the two coroners, or to two attorneys, or to any other two indifferent persons. 2 Hale 275; 4 Blk. Com. 353; 2 Roll. Rep. 363. If they find in favor of the challenge, a new venire is awarded to the coroners, or, if they be interested, to the jurors. See 1 Inst. 158; R. v. Dolby, 2 Barn. & C. 104, 9 Eng. C. L. 54. There the defendant, being indicted for a seditious libel, challenged the array on the ground that the prosecution was instituted by an association called the Constitutional Association, and that one of the sheriffs who returned the jury was one of the association. The counsel for the prosecution thereupon took issue; the chief justice then appointed two triers to try the issue, who were accordingly sworn; the counsel for the defendant first addressed these triers, and called a witness, who proved that the sheriff named was one of the subscribers to the association. The counsel for the prosecution then addressed the triers, and called a witness to prove that the sheriff had ceased to be a subscriber to or member of the association before the return of the jury process, but failed in proving it for want of the letter by which the sheriff had withdrawn himself from it. The triers were then addressed by the counsel for the defendant in reply. The chief justice summed up. The triers found in favor of the challenge, and the cause was adjourned. If the triers find against the challenge, the trial proceeds as if no such challenge had been made. The improper dis-

allowance of a challenge is ground, not for a new trial, but for a venire de novo.—R. v. Edmonds, 4 Barn. & Ald. 471, 6 Eng. C. L. 564."

"If the challenge is to the first juror called, the court may select any two indifferent persons as triers; if they find against the challenge, the juror will be sworn, and be joined with the triers in determining the next challenge; but as soon as two jurors have been found indifferent, and have been sworn, every subsequent challenge will be referred to their decision.—2 Hale 275; Co. Lit. 158a; Bac. Abr. Juries, E. 12."

Where a juror was challenged for favor, on a trial for murder, and the first two jurors sworn having been appointed triers, sworn as such, and on hearing the evidence, arguments, and charge, could not agree, it was held that the next two (the third and fourth) should be selected to rehear the matter as triers; and they were so sworn.—People v. Dewick, 2 Park. Cr. Rep. (N. Y.) 230.

—The oath of the triers, as given in the 17th edition of Archbold's Criminal Pleading, published in 1871, pp. 154, 155, is: "You shall well and truly try whether A. B., one of the jurors, stands indifferently to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God." It has been ruled in New York to be error to swear the triers simply to find whether the juror is indifferent "upon the issue joined."—Freeman v. People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216.

§ 1623 NO CHALLENGE TO TRIERS. From the necessities of the case, no challenge of triers is admissible.¹

§ 1624. WHEN TRIERS ARE NOT ASKED FOR, PARTIES ARE BOUND BY DECISION OF COURT. When the facts on which a challenge rests are disputed,¹ the proper course is to submit the question to triers; but if neither of the parties ask for triers to settle the issue of the fact, and submit their evidence, whether consisting of the juror's voir dire or of extraneous evidence,² to the judge, and take his determination thereon, they can not afterwards object to his competence to decide that issue.³ The production of evidence to the judge without asking for triers will be considered as the substitution of him in the place of triers; and his decision will be treated in like manner as would the decision of triers; and, therefore, although the determination of the judge should be against the weight of evidence, a new trial will not be granted for that cause when the defendant is acquitted, in analogy to the principle, that if on a main question in a criminal case the defendant was found not guilty, there can not be a new trial.⁴ The same distinction has been applied by the Supreme Court

¹ Archbold's C. P., 17th ed., 154, 155.

Oath of witness before triers: The form of oath to be administered to a witness sworn to give evidence before the triers is as follows: "The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth, and nothing but the truth. So help you God." The topic of examination of the challenged juror has been already noticed. *Supra*, § 1618.

¹ See, *supra*, §§ 1544, 1606.

² In Arkansas, and perhaps elsewhere, the statutory method is upon the oath of the juror alone,

where the trial is by the court; by other evidence to the exclusion of the oath of juror, where by triers.—*Stewart v. State*, 13 Ark. 720.

In Michigan witnesses may be called to testify to any fact tending to show the incompetency of the challenged juror.—*People v. Evans*, 72 Mich. 367, 40 N. W. 473.

³ *Stewart v. State*, 13 Ark. (8 Eng.) 720; *People v. Doe*, 1 Mich. 451; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *People v. Rathbun*, 21 Wend. (N. Y.) 599; *O'Brien v. People*, 36 N. Y. 270, 3 Abb. Pr. N. S. 368.

⁴ *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

of the United States on a writ of error to the decision of the trial court upon a challenge for principal cause.⁵

§ 1625. ALL EVIDENCE TENDING TO SHOW BIAS IS ADMISSIBLE ON TRIAL. Upon the trial of a challenge for favor, it is erroneous to limit the evidence to such as goes to establish a fixed and absolute opinion touching the guilt or innocence of the prisoner. A fixed opinion of the guilt or innocence of the prisoner, though it may be necessary to sustain a challenge for principal cause, need not be proved where the challenge is for favor. A less decided opinion may be shown and exhibited to the triers, who must determine upon its effect. Thus, when the question is submitted to the triers, a juror challenged for favor, if examined, may be asked whether he ever thought the prisoner guilty; or what impressions statements which he had heard or read respecting the evidence had made upon his mind; and, on the same reasoning, an opinion imperfectly formed, or one based upon the supposition that facts are as they have been represented, may be proved before the triers upon such a challenge.¹ The question is to be submitted as a question of fact, upon all the evidence, to the conscience and discretion of the triers, whether the juror is indifferent or not, and any fact or circumstance from which bias or prejudice may justly be inferred, although weak in degree, is admissible evidence.²

⁵ *United States v. Reynolds*, 98 U. S. 145, 25 L. Ed. 244.

The finding of the trial court upon the question of fact ought not to be set aside in a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trials because the verdict is against the evidence. If a juror is challenged for principal cause, and the challenge sustained,

the judgment, it was ruled, will not be reversed upon error if it appears that, although the challenge was not good for cause, it was for favor.—*United States v. Reynolds*, 98 U. S. 145, 25 L. Ed. 244.

¹ *Barber v. State*, 13 Fla. 675; *People v. Puller*, 2 Park. Cr. Rep. (N. Y.) 16.

See, *supra*, § 1624, footnote 2.

² *Moon v. State*, 68 Ga. 687; *People v. Bodine*, 1 Den. (N. Y.) 281. In New York, under the old prac-

§ 1626. — BUT BIAS MUST BE SHOWN TO SET ASIDE JUROR. Though it is not a good ground of challenge to a juror for principal cause that he has an impression as to the defendant's guilt or innocence,¹ yet, upon a challenge for favor, evidence as to such impression is admissible; but the juror should not be set aside unless it is found that he has formed a settled opinion.² And when he has denied such bias on the voir dire, it must be proved by a preponderance of proof.³

V. PERSONAL PRIVILEGE OF JUROR TO BE EXCUSED, WHICH, HOWEVER, A PARTY CAN NOT ADVANCE AS GROUND OF CHALLENGE.

§ 1627. IN GENERAL. Independently of the reasons heretofore specified, there are cases in which a juror may be privileged from serving, but in which, as we have

tice, it is said that the court should not instruct the triers how to find.—*People v. McMahon*, 2 Park. Cr. Rep. (N. Y.) 663.

Upon a challenge for favor, if the court err in admitting or rejecting the evidence, or instructing the triers upon matters of law, a bill of exceptions lies. The remedy would be the same if the court should overrule such a challenge when properly made, or refuse to appoint triers. Per Beardsley, J. The fact that a prisoner did not avail himself, as he might, of a peremptory challenge to exclude a juror, who was found indifferent upon a challenge for cause, may not, as we will soon see more fully, prevent him from taking advantage of an error committed on the trial of the challenge for cause, though it appears that his peremptory challenges were not exhausted when the empanelling of the jury was completed. See, *infra*, § 1628.

In Georgia, where a juror is put upon the triers to ascertain his competency, the trial should be conducted in the presence of the court; but it is not error if the triers are allowed to retire with the juror and question him in private.—*Epps v. State*, 19 Ga. 102.

¹ *People v. Honeyman*, 3 Den. (N. Y.) 121.

² *People v. Lochman*, 2 Barb. (N. Y.) 216.

Where challenge for principal cause is overruled by the court, and the juror is then challenged for favor, it is erroneous to instruct the triers that the latter challenge is in the nature of an appeal from the judgment of the court upon the facts ruled on by the court.—*Freeman v. People*, 4 Den. (N. Y.) 9, 35, 47 Am. Dec. 216.

³ *Goree v. State*, 71 Ala. 7; *Davidson v. People*, 90 Ill. 221.

already seen, the privilege must be set up by himself or by the court,¹ and can not be technically regarded as a ground of challenge,² and, a fortiori, not for error or motion in arrest.³ Thus, a juror may be excused from serving on ground of old age;⁴ of deafness or other infirmity incapacitating him from proper discharge of duty;⁵ and of holding excusatory offices.⁶ And the excusing of the juror for reasons of this class is always within the discretion of the court, irrespective of the statutes relating to challenges.⁷ Allowing such excuses, therefore, is not ordinarily ground for exception.⁸

VI. REVISION BY APPELLATE COURT.

§ 1628. DEFENDANT NOT EXHAUSTING HIS PEREMPTORY CHALLENGES CAN NOT EXCEPT IN ERROR TO COURT OVERRULING CHALLENGE FOR FAVOR. Can a defendant, who has not exhausted his peremptory challenges, object in error to the action of the court below in deciding against him a challenge for favor? There is good authority for holding that in ordinary cases he can not. He is bound, it is

¹ Supra, § 1607.

Grand juror who might claim exemption, but does not, indictment voted by him valid.—*State v. Quimby*, 51 Me. 395; *State v. Wright*, 53 Me. 328; *State v. Easter*, 30 Ohio St. 542, 27 Am. Rep. 478.

See note, 28 L. R. A. 200.

² Supra, § 1607. See, also, *Crawford v. United States*, 30 App. D. C. 1; *Brown v. State*, 40 Fla. 459, 25 So. 63; *People v. Rawn*, 90 Mich. 377, 51 N. W. 522.

³ FLA.—*Blount v. State*, 30 Fla. 287, 4 So. 547. IOWA—*State v. Gillick*, 7 Iowa 287; *State v. Adams*, 20 Iowa 486. ME.—*State v. Quimby*, 51 Me. 395; *State v. Wright*, 53 Me. 328; *State v. Day*, 79 Me. 120, 8 Atl. 544. MD.—*Green*

v. State, 59 Md. 123, 43 Am. Rep. 542. MASS.—*Munroe v. Brigham*, 36 Mass. (19 Pick.) 368. N. H.—*State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132.

See *Proffatt on Jury Trials*, § 130.

⁴ *Davis v. People*, 19 Ill. 74; *Breeding v. State*, 11 Tex. 257.

⁵ *Jesse v. State*, 20 Ga. 156; *Green v. State*, 59 Md. 123, 43 Am. Rep. 542; *Malcahy v. R. L. R.*, 3 H. L. Cas. 306.

See, also, supra, § 1607.

⁶ *State v. Quimby*, 51 Me. 395; *Burnes v. State*, 12 Tex. App. 269.

⁷ *State v. Marshall*, 8 Ala. 302; *Ladd v. State*, 17 Fla. 215; *Doyal v. State*, 70 Ga. 134.

See, also, supra, § 1607.

⁸ *State v. Gill*, 14 S. C. 410.

argued, if he objects to the juror, and his objection is overruled by the court to challenge such juror peremptorily, supposing the case ultimately shows that he has challenges to spare.¹ But if it appear that the defendant was misled by the action of the court, or that he was in any way excluded from making a peremptory challenge of the juror in question, then he should be allowed to review the decision in error.² And we may also hold that where the defendant peremptorily challenges the juror after admission by the court, without exhausting his peremptory challenges, no error lies.³ But error lies when the

1 ALA.—*Iverson v. State*, 52 Ala. 170. CAL.—*People v. Stonecipher*, 6 Cal. 405; *People v. McGungill*, 41 Cal. 429. CONN.—*State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89. ILL.—*Wilson v. People*, 90 Ill. 229; *Collins v. People*, 103 Ill. 21. IOWA.—*State v. George*, 62 Iowa 682, 18 N. W. 298; *State v. Winter*, 72 Iowa 627, 34 N. W. 475. LA.—*State v. Farrer*, 35 La. Ann. 315. MICH.—*Sullings v. Shakespeare*, 46 Mich. 408, 41 Am. Rep. 166. NEV.—*Bohannon v. State*, 15 Nev. 209. N. Y.—*People v. Knickerbocker*, 1 Park. Cr. Rep. 302. N. C.—*State v. Benton*, 22 N. C. (2 Dev. & B. L.) 196; *Capehart v. Stewart*, 80 N. C. 101. S. C.—*State v. McQuaige*, 5 S. C. 429; *State v. Anderson*, 26 S. C. 599. TENN.—*McGowan v. State*, 17 Tenn. (9 Yerg.) 154; *Norfleet v. State*, 32 Tenn. (4 Sneed) 340; *Taylor v. State*, 79 Tenn. (11 Lea) 708. TEX.—*Grissom v. State*, 8 Tex. App. 386; *Holt v. State*, 9 Tex. App. 571; *Lum v. State*, 11 Tex. App. 483. VT.—*State v. Gaffney*, 56 Vt. 451. FED.—*Burt v. Panjaud*, 99 U. S. 180, 25 L. Ed. 451; *Hopt v. Utah*, 120 U. S. 480,

7 Sup. Ct. 614, 30 L. Ed. 708; *In re Spies*, 123 U. S. 131, 31 L. Ed. 80, sub nom. *Spies v. Illinois*, 8 Sup. Ct. Rep. 21, 22.

Compare: *Brown v. State*, 70 Ind. 576; *Jones v. State*, 55 Md. 350.

2 ALA.—*Birdsong v. State*, 47 Ala. 68. ILL.—*Baxter v. People*, 8 Ill. (3 Gilm.) 386. LA.—*State v. Melton*, 37 La. Ann. 77; *State v. Redmond*, 37 La. Ann. 774. MISS.—*Moriarity v. State*, 62 Miss. 655. N. Y.—*People v. Freeman*, 1 Den. 9, 35; *People v. Bodine*, 1 Den. 282. S. C.—*State v. Clyburn*, 16 S. C. 375. TEX.—*Loggins v. State*, 12 Tex. App. 65; *Wright v. State*, 12 Tex. App. 163. VA.—*See Lithgow v. Com.*, 4 Va. (2 Va. Cas.) 297.

3 ARK.—*Stewart v. State*, 18 Ark. (8 Eng.) 720. D. C.—*United States v. Neverson*, 1 Mack. 152. IND.—*Stephenson v. State*, 110 Ind. 358, 59 Am. Rep. 216, 11 N. E. 360. MINN.—*State v. Lawlor*, 28 Minn. 216, 9 N. W. 698. MISS.—*Ogle v. State*, 33 Miss. 383. TEX.—*Burrell v. State*, 18 Tex. 713; *Sharp v. State*, 6 Tex. App. 650.

See cases cited supra, § 1552.

defendant's peremptory challenges have been exhausted so that he has been unable to correct the misruling by challenge.⁴

§ 1629. — OTHERWISE WHEN HE EXHAUSTED HIS PEREMPTORY CHALLENGES. Where a defendant exhausts his peremptory challenges on trial, if in such case the statute gives a writ of error to rulings of courts on challenges, there can be no question that an erroneous action of the court below, on admitting a juror after challenge for favor, is ground for reversal.¹ The reason for the rule is said to be the fact that the number of peremptory challenges is thereby reduced,² though this reason is not sanctioned by all the cases;³ hence, where the party still has sufficient peremptory challenges left to enable him to exclude all objectionable jurors and secure a jury to his satisfaction, the reason for the rule ceases,⁴ although the contrary has been held.⁵ In some jurisdictions, however, the action of the court on challenges for favor is

⁴ *People v. Casey*, 93 N. Y. 38.

¹ *Loggins v. State*, 12 Tex. App. 65; *Wright v. State*, 12 Tex. App. 163; *Wade v. State*, 12 Tex. App. 358.

² ILL.—*Baxter v. People*, 8 Ill. (3 Gil.) 368; *Meaux v. Whitehall (Town of)*, 8 Ill. App. 173. IND.—*Fletcher v. Crist*, 139 Ind. 121, 38 N. E. 472. LA.—*State v. Breaux*, 104 La. 540, 29 So. 222. N. Y.—*People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616. VA.—*Dowdy v. Com.*, 50 Va. (9 Gratt.) 727, 60 Am. Dec. 314.

Acceptance of justice of peace as juror over challenge for cause, that being a ground under the statute, after the party has exhausted his peremptory challenges, is cause for reversal.—*Terrell v. State*, 69 Ark. 449, 64 S. W. 223.

³ MISS.—*Fernday v. Selser*, 5 Miss. (4 How.) 506. N. M.—*Territory v. Young*, 2 N. M. 93. N. Y.—*Freeman v. People*, 4 Den. 9, 74 Am. Dec. 216; *Friery v. People*, 54 Barb. 319; affirmed, *41 N. Y. (2 Keyes) 424. N. C.—*State v. Freeman*, 100 N. C. 429, 5 S. E. 921.

⁴ CONN.—*State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89. D. C.—*United States v. Neverson*, 1 Mack. 152. N. J.—*Drake v. State*, 53 N. J. L. (24 Vr.) 23, 20 Atl. 747. N. M.—*Territory v. Padilla*, 12 N. M. 1, 17 Pac. 1084. N. Y.—*People v. Price*, 53 Hun 185, 6 N. Y. Supp. 833; affirmed, 119 N. Y. 650, 23 N. E. 1149. VT.—*State v. Gaffney*, 16 Vt. 451.

⁵ *Lithgow v. Com.*, 4 Va. (2 Va. Cas.) 297.

exclusively a matter of judicial discretion, and not ground for error.*

§ 1630. ERROR LIES WHEN CHALLENGE IS ON RECORD. When the action of the court, as in cases of challenges to the array and peremptory challenges, is placed on record, and there is a regular issue and joinder, and judgment on this issue, then error lies to this at common law.¹

* *Costly v. State*, 19 Ga. 614;
Buchanan v. State, 24 Ga. 282;
Heath v. Com., 40 Va. (1 Rob.) 735;
R. v. Edmonds, 4 Barn. & Ald. 471,
6 Eng. C. L. 564.

¹ *Infra*, § 1711; *Phillips v. State*,
68 Ala. 469; *People v. Vasquez*, 49
Cal. 860; *People v. Colson*, 49 Cal.
679; *Thomas v. People*, 67 N. Y.
218.

See, also, *infra*, §§ 1711 et seq.

CHAPTER XCII.

CERTAIN SPECIAL INCIDENTS OF TRIAL.

I. FURNISHING COPY OF INDICTMENT.

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§ 1632. When separate indictments can be concurrently tried.

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§ 1643. Questions of law are for court.

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§ 1647. Must, if required, give distinct answer as to law.

§ 1648. Error for judge to exclude point from jury unless there is no evidence.

§ 1649. Charge must be in open court, and before parties.

§ 1650. When statute requires must be in writing.

I. FURNISHING COPY OF INDICTMENT.

§ 1631. **MAY BE REQUIRED BY STATUTE.** In some jurisdictions, adopting in this respect English statutes, passed at a time when but for such a provision a defendant might have been precluded from learning the actual charge against him, the defendant is entitled to have delivered to him a copy of the indictment, duly certified,¹ and in some jurisdictions, also, he is entitled to a list of the witnesses against him.² But this practice does not preclude the prosecution from calling, in cases of surprise, other witnesses on trial.³

¹ ALA.—*Ben v. State*, 22 Ala. 9, 58 Am. Dec. 234; *Brister v. State*, 26 Ala. 107; *Robertson v. State*, 43 Ala. 325; *Bain v. State*, 70 Ala. 4; *Tidwell v. State*, 70 Ala. 33; *Hubbard v. State*, 72 Ala. 164. ARK.—*Wright v. State*, 42 Ark. 94. OHIO—*Fouts v. State*, 8 Ohio St. 75. VT.—*State v. Fuller*, 39 Vt. 74. FED.—*United States v. Curtis*, 4 Mas. 232, Fed. Cas. No. 14905.

As to English practice, see *R. v. Burke*, 10 Cox 519; *R. v. Hughes*, 4 Cox 519.

Failure of record to show accused was furnished with a copy of the indictment and list of the jury before trial, as required by statute, if no objection was made at the trial because of this omission, it is not available in error.—*Ben v. State*, 22 Ala. 9, 58 Am. Dec. 234.

Material variance between copy and original may be ground for continuance, see *Tidwell v. State*, 70 Ala. 33.

As to proceedings on lost indictment, see, *supra*, § 327.

Severance need not be affirmed. *Crim. Proc.*—130

actively shown in error, see *Shelton v. State*, 73 Ala. 8.

² ILL.—*Scott v. People*, 63 Ill. 508. IOWA—*State v. Gillick*, 10 Iowa 98; *State v. Stanley*, 33 Iowa 526. MASS.—*Com. v. Knapp*, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491; *Com. v. Edwards*, 70 Mass. (4 Gray) 1. MICH.—*Hill v. People*, 26 Mich. 496. FED.—*United States v. Wood*, 3 Wash. 440, Fed. Cas. No. 16756.

As to English practice, see *R. v. Vincent*, 9 Car. & P. 22; *R. v. Bull*, 9 Car. & P. 22, 38 Eng. C. L. 25.

Privilege in each case is one which may be waived, either expressly or by going to trial without objection. *Infra*, § 1668. See, also: GA.—*Bird v. State*, 50 Ga. 585; LA.—*State v. Jackson*, 12 La. Ann. 679. MO.—*Lisle v. State*, 6 Mo. 426. N. H.—*Lord v. State*, 18 N. H. 173. OHIO—*Fouts v. State*, 8 Ohio St. 98. TENN.—*Taylor v. State*, 79 Tenn. (11 Lea) 709. VT.—*State v. Norton*, 45 Vt. 258. ENG.—*R. v. Frost*, 9 Car. & P. 162, 38 Eng. C. L. 105.

³ *Supra*, § 1285.

II. CONCURRENT TRIAL OF SEPARATE INDICTMENTS.

§ 1632. WHEN SEPARATE INDICTMENTS CAN BE CONCURRENTLY TRIED. As we have elsewhere seen, it is no objection to the joinder of several counts in an indictment, and their concurrent trial, that they contain distinct offenses if such offenses relate to the same general transaction.¹ For the same reason it has been held that two indictments against the same defendant, embracing different phases of a conspiracy, can be tried together, against the defendant's objection.² But, unless the offenses are such as could properly be joined in one indictment, they ought not to be thus concurrently tried.³

When cross prosecutions of assault and battery are simultaneously pending, the practice is for them to be tried together, as by this process the ends of justice are subserved.⁴

III. SEVERANCE OF DEFENDANTS ON TRIAL.

§ 1633. JOINT DEFENDANTS MAY SEVER ON TRIAL. As a general rule, joint defendants are entitled to a severance on trial.¹ Whether, as has been seen, there can be severance in indictments for conspiracy and riot, has been doubted, though the preponderance of authority is in favor of the right even in these cases.²

¹ Supra, § 335.

² Withers v. Com., 5 Serg. & R. (Pa.) 59; Brightly's Dig. Pa. Rep. 498.

³ State v. Devlin, 25 Mo. 175.

⁴ See R. v. Wanklyn, 8 Car. & P. 290, 34 Eng. C. L. 739.

¹ Supra, §§ 361, 362, where the authorities are given.

² In Casper v. State, 47 Wls. 535, 2 N. W. 1117, we have the following on this point: "Although the practice may work inconvenience, and even difficulty, separate trials may be had upon indictment or

information for conspiracy," citing State v. Buchanan, 5 Har. & J. (Md.) 500, 9 Am. Dec. 534; People v. Olcott, 2 John. (N. Y.) 301; R. v. Kinnersley, 1 Str. 193, 93 Eng. Repr. 467; R. v. Scott, 3 Burr. 1262, 97 Eng. Repr. 822; R. v. Cooke, 5 Barn. & C. 538, 11 Eng. C. L. 574; R. v. Kendrick, 5 A. & E. 49; R. v. Ahearne, 6 Cox C. C. 6.

"The case of Com. v. Mason, 2 Ashm. (Pa.) 31, holds otherwise, but cites no authorities. Informations for conspiracy are there-

IV. ARRAIGNMENT.

§ 1634. DEFENDANT USUALLY REQUIRED TO HOLD UP THE HAND. The defendant being brought into court for trial, the first step is to call upon him by name to answer the matter charged on him in the indictment.¹ By the old law, he was required to stand up and hold up his hand, the object being to compel the full extension of his person, and in this way to determine identity. One or two

fore within §§ 4680, 4685, Rev. Stat. When the venue is changed for some only of the defendants in indictment or information for conspiracy, separate trials must be had. The plaintiff in error was therefore properly tried alone in the municipal court. When several are prosecuted together for crime, which one, or other limited number only, can not commit, like conspiracy or riot, and are taken and may be brought to trial, and on separate trials verdicts go against a number incapable in law of committing the crime, judgment against those found guilty should be suspended until the number necessary to the crime are convicted. Failing that, those against whom verdicts have been found should be discharged. When the verdicts are found against the number necessary to the crime, then judgment should go against them."

¹ See, *supra*, §§ 1336 et seq.; 1 Chitty Cr. L. 351; 4 Bl. Com., ch. xxv.

"The arraignment of prisoners, against whom true bills for indictable offenses have been found by the grand jury, consists of three parts: first, calling the prisoner to the bar by name; secondly, reading the indictment to him;

thirdly, asking him whether he be guilty or not of the offense charged.

"It was formerly the practice to require the prisoner to hold up his hand, the more completely to identify him as the person named in the indictment, but the ceremony, which was never essentially necessary, is now disused; and the ancient form of asking him how he will be tried is also obsolete. The prisoner is to be brought to the bar without irons, shackles, or other restraint, unless there be danger of escape; and ought to be used with all the humanity and gentleness which are consistent with the nature of the thing, and under no terror or uneasiness other than what proceeds from a sense of his guilt or the misfortune of his present circumstances." See, *supra*, § 1476; 2 Hawk., ch. 28, § 1; 1 East P. C. 371; Layer's Case, 6 St. Tr. 230.

As to English practice, see, further, Archbold's Pl. & Ev., 17th ed., 1871, p. 110. *Supra*, § 1336.

The arraignment may take place immediately on finding of bill.—*State v. Chenier*, 32 La. Ann. 103; *State v. Shields*, 33 La. Ann. 410; *supra*, § 1345.

When a case in which defendant is arraigned is removed to another court, there is to be no fresh ar-

cases, in fact, are recorded in which, on the prisoner thus rising and extending his hand, peculiarities were brought out,—e. g., as in left-handedness,—touching the question of identity. But in England the form is no longer obligatory,² though it is still maintained in some parts of the United States, with the qualification that if the defendant refuses to hold up his hand, but confesses that he is the person named, this is enough.

§ 1635. **FAILURE TO ARRAIGN MAY BE FATAL.** Wherever the duty to arraign is imperative, failure in the performance of this duty is fatal, when the record shows the failure, in an appellate court,¹ though arraignment may be

raignment. *Supra*, § 1537; *Davis v. State*, 39 Md. 355.

² 4 Black. Com. 323.

¹ CAL.—*People v. Gains*, 52 Cal. 480. IND.—*Graeter v. State*, 54 Ind. 159. MICH.—*Griggs v. People*, 31 Mich. 471. MINN.—*State v. Thompson*, 32 Minn. 144, 19 N. W. 730. MO.—*State v. Vanhook*, 88 Mo. 105. OHIO.—*Hanson v. State*, 43 Ohio St. 376, 1 N. E. 136. TEX.—*State v. Smith*, 1 Tex. App. 408. WIS.—*Anderson v. State*, 3 Pinn. 367. ENG.—*R. v. Fox*, 10 Cox C. C. 502.

As differing from text, *Turpin v. State*, 80 Ind. 148; *People v. Ah Hop*, 1 Ida. 698; *State v. Cassaday*, 12 Kan. 550; *People v. Ousterhout*, 34 Hun (N. Y.) 261.

And arraignment which was accidentally omitted at the proper time, may be made after the jury was sworn and the jury re-sworn, but before the reception of evidence. See *Weaver v. State*, 83 Ind. 289.

But an order for a *nunc pro tunc* arraignment must be made in the defendant's presence.—*Baker v. State*, 39 Ark. 180.

In Missouri, see *State v. Saunders*, 53 Mo. 234.

Colorado Supreme Court, in *People v. Lawton*, 61 Colo. 566, 158 Pac. 1099, 83 Cent. L. J. 221, reaffirms previous holdings that where a person goes to trial without objection to his not having been arraigned, though there is no claim to prejudice from his not having been arraigned, the verdict can not be allowed to stand, following *Ray v. People*, 6 Colo. 231; *Wright v. People*, 22 Colo. 143, 43 Pac. 1021, and *People v. Heath*, 51 Colo. 183, 117 Colo. 139.

—A vigorous dissent by Mr. Justice Garrigues, who is joined by Mr. Justice Scott, who claim that two, at least, of the cases referred to were decided prior to a statute which another of them claims to have no bearing on the question. The dissent claims that it does change the old rule as the words forbidding reversal for any defect which does not tend to prejudice substantial rights on the merits are general in their sweep.

The dissent is bottomed, principally, upon the rule laid down

inferred from the averments that the defendant was in court and was duly called on to plead.² The arraignment need not be repeated after a mistrial.³

§ 1636. **DEFENDANT MAY WAIVE RIGHT.** Where there is evidence on record of the defendant's presence, the reading to him of the demand of guilty or not guilty may in some jurisdictions be waived by plea,¹ or by equivalent action on the part of the defendant.²

The plea of guilty should be given by the defendant personally.³

V. BILL OF PARTICULARS.

§ 1637. **WHEN INDICTMENT IS GENERAL, BILL OF PARTICULARS MAY BE REQUIRED.** Wherever the indictment is so gen-

in *Garland v. Washington*, 232 U. S. 642, 58 L. Ed. 772, 34 Sup. Ct. Rep. 456, in which it was held that it was apparent lack of arraignment and plea and wrought no prejudice, and should not work a reversal.

A great number of other decisions are cited as overruling elder cases, the *Garland* case itself being of this sort. It was said in that case that this technical objection was enforced before "with improved methods of procedure and greater privileges to accused, any reason for strict adherence to the mere formalities of trial would seem to have passed away."

² *Fitzpatrick v. People*, 98 Ill. 259.

Failure to show arraignment in a misdemeanor is not under U. S. Rev. Stats., § 1025, 12 Fed. Stats. Ann., 1st ed., p. 340; 2 Fed. Stats. Ann., 2d ed., p. 681; ground to reverse, see *United States v. Molloy*, 31 Fed. 19.

³ *Hayes v. State*, 58 Ga. 35; *Atkins v. State*, 69 Ga. 595; *State*

v. Boyd, 38 La. Ann. 374; *State v. Simms*, 71 Mo. 538; *State v. Stewart*, 26 S. C. 125.

Whether arraignment is necessary has become almost exclusively a subject of statutory enactment. In Pennsylvania, by the Act of January 8, 1867, arraignment is only required in cases triable exclusively in oyer and terminer. In such cases it is obligatory.—*Dougherty v. Com.*, 69 Pa. St. 286.

It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried.—*State v. Ketchey*, 70 N. C. 621.

¹ See, fully, *supra*, § 1477.

² *People v. Osterhoute*, 41 N. Y. 261; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524.

³ *People v. McCrory*, 41 Cal. 459. *Supra*, §§ 1336 et seq.

As to Indiana practice in respect to reading the indictment to the defendant, and the terms of the arraignment, see *Clare v. State*, 68 Ind. 17.

eral as to give the defendant inadequate notice of the charge he is expected to meet, the court, on his application, will require the prosecution to furnish him with a bill of particulars of the specific charge to be pressed, or the evidence intended to be relied on.¹ That indictments may be thus general, and yet in entire conformity with precedent, has been heretofore abundantly shown. It is allowable to indict a man as a common barrator, or as a common seller of intoxicating liquors, or as assaulting a person unknown, or as conspiring with persons unknown to cheat and defraud the prosecutor by "divers false tokens and pretenses"; and in none of these cases is the allegation of time material, so that the defendant is obliged to meet a charge of an offense comparatively undesignated, committed at a time which is not designated at all. Hence has arisen the practice of requiring, in such cases, bills of particulars; and the adoption of such bills, instead of the exacting of increased particularity in indictments, is productive of several advantages. It prevents cumbrous special pleading, and consequently failure of justice, as no demurrer lies to bills of particulars.²

¹ Williams v. Com., 91 Pa. St. 493; Goersen v. Com., 99 Pa. St. 388.

As to specification of place of nuisance, see State v. Hill, 13 R. I. 314.

² See Com. v. Davis, 28 Mass. (11 Pick.) 432.

In People v. Davis, 52 Mich. 569, 18 N. W. 362, such a bill was granted on a prosecution for adultery.

"It seems that the proper course is for the defendant to apply to the prosecutor, in the first instance, for particulars of the offense; and, if they are refused, to apply to the court or a judge, upon an affidavit of that fact, and that the accused is unable to understand the precise

charge intended." — R. v. Downshire, 4 Ad. & E. 699, 31 Eng. C. L. 309; R. v. Hodgson, 3 Car. & P. 422, 14 Eng. C. L. 642; R. v. Bootyman, 5 Car. & P. 301, 24 Eng. C. L. 576.

Application may be made to the judge at the assizes. — R. v. Hodgson, 3 Car. & P. 422, 14 Eng. C. L. 642, where Vaughn, B., said he would, if necessary, put off the trial in order that particulars might be delivered.

In barratry, however, it seems to be necessary to give particulars without any demand. — 1 Curw. Hawk. 476, § 13.

"If particulars have been delivered, the prosecutor will not be allowed to go into other charges

And it gives the defendant, in plain, unartificial language, notice of the charge he is to meet.

§ 1638. **AFFIDAVIT SHOULD BE MADE.** As has been already seen, bills of particulars may be ordered under the usual general count in conspiracy,¹ under indictments for being a common seller of liquor,² and under indictments for embezzlement,³ and for being a common barrator or common scold.⁴ But it is proper, in order to justify the ordering by the court of such a bill, that the defendant should make affidavit that he is, from the generality of the indictment, unable to duly prepare himself for his defense.

§ 1639. **PARTICULARS MAY BE ORDERED ON GENERAL PLEAS.** Of course the same reasoning applies when the defendant sets up, by way of confession and avoidance, a defense which is substantially a new case. In such instances,—e. g., where the defense, to an indictment for libel charging general official misconduct, is the truth of the charge,—the defendant may be, on due cause shown, compelled to state the particulars of his defense.¹

§ 1640. **ACTION ON PARTICULARS NOT USUALLY SUBJECT OF ERROR.** It is said that the allowance of bills of particulars is within the discretion of the presiding judge, and is not subject of error.¹ Yet whenever a bill of particulars

than those contained therein. If particulars have been ordered, but not delivered, it seems that the prosecutor can not be precluded from giving evidence on that account."—*R. v. Esdalle*, 1 F. & F. 213-227.

The proper course is to apply to put off the trial.—*Rosc. Cr. Ev.*, p. 192.

¹ *Supra*, § 199; 2 Kerr's Whart. Crim. Law, § 1653.

² *Com. v. Giles*, 67 Mass. (1 Gray) 466; *Com. v. Wood*, 70 Mass. (4 Gray) 11; *State v. Bacon*, 41 Vt. 526, 98 Am. Rep. 616.

³ *State v. Cushing*, 11 R. I. 314; *R. v. Hodgson*, 3 Car. & P. 422, 14 Eng. C. L. 642; *R. v. Bootyman*, 5 Car. & P. 301, 24 Eng. C. L. 576.

See 2 Kerr's Whart. Crim. Law, § 1295.

⁴ *R. v. Uryln*, 2 Saund. (Williams' ed.) 308, 85 Eng. Repr. 1107.

¹ *Com. v. Snelling*, 32 Mass. (15 Pick.) 322.

¹ *Com. v. Giles*, 67 Mass. (1 Gray) 466; *Gardner v. Gardner*, 68 Mass. (2 Gray) 434; *Com. v. Wood*, 70 Mass. (4 Gray) 11; *Harrington v. Harrington*, 107 Mass. 329.

is a substitute for special averments in an indictment, error should be entertained. The same right of exception allowed to the defendant in the one case should be allowed, unless there be a statutory impediment, in the other. The appellate court should have the power of determining whether there is enough filed against the defendant to put him on his trial.

VI. DEMURRER TO EVIDENCE.

§ 1641. DEMURRER TO EVIDENCE BRINGS UP WHOLE CASE. In several of the United States it has been held, as has been seen, that the defendant may demur to the evidence; though when this is done, the prosecution is not compelled to join in the demurrer, but may, at its election, go to the jury.¹ In Massachusetts, the court, when there is no evidence to convict, will take the case from the jury,² and in New York, under similar circumstances, the court advises and virtually directs an acquittal.³ Unless there be statutes prohibiting this course, this is a necessary prerogative of the judge trying the case.⁴

VII. VIEW OF PREMISES.

§ 1642. VIEW MAY BE DIRECTED TO PREMISES WHEN NECESSARY TO CAUSE. The practice which obtains in civil suits, of permitting, when authorized by local statute, the jury to visit the scene of the *res gestæ*, is adopted in criminal issues whenever such a visit appears to the court important for the elucidation of the evidence.¹ The visit, however, should be jealously guarded, so as to exclude interference by or conversation with third parties,² and should

¹ *Supra*, § 1333.

² *Com. v. Fitchburg R. Co.*, 92 Mass. (10 Allen) 189.

³ *People v. Bennet*, 49 N. Y. 137; *People v. Harris*, 1 Edm. Sel. Cas. (N. Y.) 453.

See, fully, *infra*, § 1751.

⁴ *Infra*, § 1751.

¹ *State v. Lewis*, 14 Mo. App. 197.

See *Massachusetts Gen. Stats.*, ch. 172, § 9, and 59 Mass. (5 Cush.) 298; *Chute v. State*, 19 Minn. 271.

² *People v. Green*, 53 Cal. 60.

be made under sworn officers.³ Such view may be granted after the judge has summed up the case.⁴ But where only a part of the jury visited the premises, and this, after the case was committed to the jury for their final deliberation, this was held ground for new trial.⁵ The visit, also, must be made under the supervision of officers appointed by the court,⁶ duly sworn,⁷ and in the presence of the accused, who is entitled to have all evidence received by the jury taken in his presence,⁸ though a refusal to attend by the defendant, he being duly requested and empowered

³ See 36 Cent. Law J. 436; *Fleming v. State*, 11 Ind. 234 (an arson case); *State v. Knapp*, 45 N. H. 148; *Ruloff v. People*, 18 N. Y. 179; *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y.) 25; *R. v. Martin*, L. R. 1 C. C. 378; *R. v. McNamara*, 14 Cox C. C. 229.

In what cases views can be granted, see 1 Whart. Crim. Ev. (Hilton's ed.), § 312.

In *Bostock v. State*, 61 Ga. 635, it was held error for the trial court to ask the defendant's counsel whether he objected to the jury viewing the premises, and then, on a negative answer, sending them to the view.

In *Chute v. State*, 19 Minn. 271, the court below charged the jury as follows: "You must weigh the evidence given in court, coupled with your own examination, and if you are satisfied therefrom, beyond a reasonable doubt, that the building is a nuisance, and dangerous to the public, you should so find." The Supreme Court said: "Defendant's exception to this instruction was, we think, well taken. We think the court below misconceived the proper purpose of a view by a jury. The view is not allowed for the purpose of

furnishing evidence upon which a verdict is to be found, but for the purpose of enabling the jury better to understand and apply the evidence which is given in court. *Com. v. Knapp*, 26 Mass. (9 Pick.) 515."

As to Irregular views, see, *infra*, § 1776.

⁴ *R. v. Martin*, L. R. 1 C. C. 378.

⁵ *Ruloff v. People*, 18 N. Y. 179; *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y.) 25.

⁶ *Patchin v. Brooklyn*, 2 Wend. (N. Y.) 377. See, *infra*, § 1776.

⁷ *People v. Queen*, 53 Cal. 60.

⁸ ARK.—*Benton v. State*, 30 Ark. 328. CAL.—*People v. Bush*, 68 Cal. 623, 10 Pac. 169; affirmed, *People v. Lowery*, 70 Cal. 193, 11 Pac. 605. KY.—*Rutherford v. Com.*, 78 Ky. 639. LA.—*State v. Bertin*, 24 La. Ann. 46. MO.—*State v. Sanders*, 68 Mo. 202, 30 Am. Rep. 782. NEB.—*Carroll v. State*, 5 Neb. 31. N. C.—*State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493. TEX.—*Smith v. State*, 42 Tex. 444.

Compare: *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 218, 4 N. E. 870; *State v. Adams*, 20 Kan. 311.

As to nature and effect of view by jury, see note, 42 L. R. A. 385.

As to when view of place of

to do so, may not vitiate the proceedings,⁹ and counsel of accused may waive his right to be present at the view.¹⁰ But during the view no stranger is permitted to talk with the jury,¹¹ nor can anything in the way of oral evidence be received.¹²

VIII. CHARGE OF COURT.

§ 1643. QUESTIONS OF LAW FOR THE COURT. Several branches of this subject are elsewhere distinctively considered. It has been shown that the admissibility of evidence is exclusively for the court;¹ that it is for the court alone to determine when there shall be a severance of defendants on trial;² that the court is to judge of the validity of challenges;³ that it is the duty of the court, in case any material charge of the indictment is not supported in law, so to tell the jury, directing an acquittal, and, in case of a conviction, to give a new trial;⁴ and, in fine, that all matters of law belong exclusively to the

crime may be had in absence of accused, see note, 24 Am. Dec. 631.

In *State v. Ah Lee*, 8 Ore. 214, it was held not error to direct a view without providing for the presence of the defendant or his counsel.

Counsel are not allowed to address the jury when on the view.—*Sasse v. State*, 68 Wis. 530, 32 N. W. 849.

Defendant may waive his right. See *State v. Congdon*, 14 R. I. 506. See, also, footnote 10, this section.

Refusal to allow jury to visit place of homicide, in sheriff's custody, held not error.—*State v. Lewis*, 14 Mo. App. 191.

⁹ *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 218, 4 N. W. 870; *State v. Buzzell*, 58 N. H. 257, 42 Am. Rep. 536; see *State v. Buzzell*, 59 N. H. 65; *State v. Mortensen*, 26 Utah 345, 73 Pac. 562.

Waiver presumed in such cases.

—*State v. Congdon*, 14 R. I. 506.

¹⁰ *People v. Thom*, 156 N. Y. 286, 42 L. R. A. 368, 50 N. E. 947.

Accused's request to view scene of crime a waiver of right to object to order made by court directing a view by the jury.—*Starr v. State*, 5 Okla. Cr. 473, 115 Pac. 356.

Rights of defendant waived by failure to object.—*People v. White*, 5 Cal. App. 340, 90 Pac. 471.

¹¹ *People v. Green*, 53 Cal. 60.

¹² *People v. Green*, 53 Cal. 60; *Hayward v. Knapp*, 22 Minn. 5; *State v. Lopez*, 15 Nev. 407; *Sasse v. State*, 68 Wis. 530, 32 N. W. 849.

¹ 1 Whart. Crim. Ev. (Hilton's ed.), §§ 23 et seq.

² *Supra*, § 360.

³ *Supra*, §§ 1516 et seq.

⁴ *Infra*, §§ 1744, 1751, 1752.

court, and that unless there are local statutory or constitutional provisions to the contrary, the jury is bound to take the law from the court.⁵

§ 1644. DEFENDANT HAS A RIGHT TO FULL STATEMENT OF LAW. But here comes up the question, in what way the views of the court as to the law are to be made known. At common law, and by the practice, until a recent period, of England and of the United States, no bill of exceptions could be taken in criminal cases, and there could be no writ of error, except to so much of the case as was on record. No provisions existed for filing the charge of the court, or for requiring the court to charge on particular points, or for eliciting the opinion of the court either in the affirmative or negative of a particular proposition. The only way in which the law expressed on a trial could be overhauled was by a motion for a new trial; and on such a motion the parties had to depend, as to what had taken place, upon the recollection and notes of the judge trying the case. This is still the usage in England, as well as in several of the United States; and this will account for the meagerness of the judicial literature of this branch of the law. This much, however, is clear: The law is to come from the court, and the court is bound to give the law. And it has been repeatedly declared that the defendant has a right to a full statement of the law from the judge; and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal.¹ Where, under statute, points

⁵ As to province of court, see article in 8 South. Law Rev. N. S. 401.

¹ *Infra*, § 1733. ALA.—Aaron v. State, 39 Ala. 684; Armistead v. State, 43 Ala. 340; Clements v. State, 50 Ala. 117; Woodbury v. State, 69 Ala. 12. GA.—Hinch v. State, 25 Ga. 699; Cox v. State, 32 Ga. 515; Farris v. State, 35 Ga.

241. IDA.—People v. Dunn, 1 Ida. 74. IND.—Longnecker v. State, 22 Ind. 247. IOWA—State v. Braintree, 25 Iowa 572; State v. Meshek, 51 Iowa 308, 1 N. W. 685; State v. Glyndon, 51 Iowa 463, 1 N. W. 750. KAN.—State v. Hendricks, 32 Kan. 559, 4 Pac. 1050. MO.—State v. Daubert, 42 Mo. 242; State v. Mitchell, 64 Mo. 191. N. Y.—Peo-

are given to him by counsel to charge, he must, if he affirms those points, state them specifically, and it is error to fail so to do.² And so to leave an inference of fact to the jury, as a rule of law, is error,³ and so to leave to the jury a question as to which there is no evidence,⁴ and so to give undue and unfair prominence to a particular side of the case.⁵

§ 1645. MISDIRECTION CAUSE FOR NEW TRIAL. Of the fidelity thus exacted in the discharge of this particular duty repeated illustrations are given in a succeeding chapter.¹ As is there shown, any misdirection by the court, in point of law, on matters material to the issue, is a ground for a new trial; nor is such misdirection, unless expressly

ple v. Rego, 43 Hun 127, 3 N. Y. Cr. Rep. 275. TENN.—Lancaster v. State, 43 Tenn. (3 Coldw.) 339, 91 Am. Dec. 288; Phipps v. State, 43 Tenn. (3 Coldw.) 344; Strady v. State, 45 Tenn. (5 Coldw.) 300; Souey v. State, 81 Tenn. (13 Lea) 472. VT.—State v. McDonnell, 32 Vt. 491.

In Pennsylvania, it is not usual for the Commonwealth to give points to the court.—Murray v. Com., 79 Pa. St. 311.

See, generally: COLO.—Clare v. People, 9 Colo. 122, 10 Pac. 799. GA.—Edwards v. State, 53 Ga. 428; Cicero v. State, 54 Ga. 156; Moody v. State, 54 Ga. 660; Habersham v. State, 56 Ga. 61. ILL.—Roach v. People, 77 Ill. 25. KY.—Bethel v. Com., 80 Ky. 526. MASS.—Com. v. Pemberton, 118 Mass. 36. MINN.—State v. Lautenschlager, 22 Minn. 514. MISS.—McBeth v. State, 50 Miss. 81. MO.—State v. Foster, 61 Mo. 549. PA.—Meyers v. Com., 83 Pa. St. 131. TEX.—Hudson v. State, 40 Tex. 12; Cole v. State, 40 Tex. 147; Pepperling v. State, 40

Tex. 487; Taliaferro v. State, 40 Tex. 523; Ferrell v. State, 43 Tex. 523; Cady v. State, 4 Tex. App. 238; Coffee v. State, 5 Tex. App. 545. VT.—State v. Carlton, 48 Vt. 636. WIS.—Roman v. State, 41 Wis. 312.

In Virginia it is not the practice for the trial judge to charge the law except on the points requested.—Dejarnette v. Com., 75 Va. 867.

In State v. Mahly, 68 Mo. 315, it is held to be the duty of the court, in cases of cruel homicide, to charge that the offense is murder in the first degree.

² State v. Roe, 45 N. J. L. (16 Vr.) 49.

³ Infra, § 1736.

⁴ Infra, § 1731; Goldsmith v. State, 63 Ga. 85; Smith v. State, 41 N. J. L. (12 Vr.) 370; State v. Carter, 76 N. C. 20.

⁵ Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621.

¹ Infra, §§ 1730 et seq.; see People v. Biggina, 65 Cal. 564, 4 Pac. 570.

recalled,² or unlikely to prejudice, cured by subsequent contradictory instructions,³ nor by the fact that the jury founded their verdict mainly on distinct grounds.⁴

§ 1646. JUDGE MAY GIVE HIS OPINION ON THE EVIDENCE. Unless there are conflicting statutory provisions,¹ the judge is entitled to give his opinion on the evidence, commenting as much thereon as he deems conducive to the interests of justice;² and he may also state the presump-

² *State v. Morris*, 47 Conn. 546, 36 Am. Rep. 98; *Smurr v. State*, 88 Ind. 504; *Nelson v. State*, 61 Miss. 212; *State v. Williams*, 69 Mo. 110.

³ CAL.—*People v. Valencia*, 43 Cal. 553. IND.—*McDougal v. State*, 88 Ind. 24. IOWA—*State v. Hartzell*, 58 Iowa 520, 12 N. W. 557. MO.—*State v. Hooper*, 71 Mo. 425. PA.—*Murray v. People*, 79 Pa. St. 311; *Rice v. Com.*, 100 Pa. St. 28.

⁴ *Infra*, § 1730.

¹ *Infra*, § 1736. See *White v. State*, 19 Tex. App. 343.

² *Infra*, § 1736.

Contra: In California. See *People v. Ah Sing*, 59 Cal. 400.

Contra, in Illinois, by statute.—*Weyrich v. People*, 89 Ill. 90.

—In Indiana.—*Pancake v. State*, 81 Ind. 93; *Moore v. State*, 85 Ind. 90.

—In Missouri, such comments are forbidden by statute.—*State v. Munson*, 76 Mo. 109.

—In North Carolina, by statute.—*State v. Locke*, 77 N. C. 480; *State v. Daney*, 78 N. C. 437; though see *State v. Boon*, 80 N. C. 461.

—In West Virginia.—*State v. Thompson*, 21 W. Va. 741; *State v. Sutfin*, 22 W. Va. 771.

In *United States v. Reynolds*, 98 United States 145, 25 L. Ed. 244,

exception was taken to the following clause of the charge of the trial judge: "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on they multiply, and there are pure-minded women and there are innocent children—innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land."

It was held by the Supreme Court, Waite, C. J., giving the opinion that this was no error. While every appeal of the court, so it was ruled, "to the passions or the prejudices of a jury should be promptly rebuked, and while it is the imperative duty of every reviewing court to take care that wrong is not done in this way, we see no just cause for complaint in this case. Congress, in 1862, 12 Stat. 501, saw fit to make bigamy a crime in the territories. This was done because of the evil consequences that were supposed to flow from plural marriages. All

tions of law to which the evidence gives rise.³ He is not, however, required to give his opinion as to whether certain facts are proved,⁴ and when there is a conflict of fact, he has no right to adjudicate on such conflict, and thus take it from the jury;⁵ nor has he a right to throw an unfair discredit on a legitimate defense,—e. g., alibi, or good character;⁶ nor unfairly to discriminate between special witnesses;⁷ nor unfairly to present the strong features of the prosecution ignoring those of the defense;⁸ nor to treat inferences of fact as if they were presump-

the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they had to perform."

"Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury."—Griffin v. State, 76 Ala. 32, citing 1 Green. Ev., § 49; s. p., State v. Atkinson, 75 N. C. 519.

³ *Infra*, § 1731.

⁴ People v. Messersmith, 61 Cal. 246; Com. v. Broadbeck, 124 Mass. 319; People v. Jones, 24 Mich. 216.

⁵ *Infra*, §§ 1731-1736. ALA.—Hughes v. State, 75 Ala. 31. IND.—Scott v. State, 64 Ind. 600. MICH.—People v. Arnold, 40 Mich. 710. N. Y.—Watson v. People, 64 Barb. 130. N. C.—State v. Byers, 80 N. C. 426.

⁶ 1 Whart. Crim. Ev. (Hilton's ed.), § 333; *infra*, § 1731. CAL.—People v. Malaspina, 57 Cal. 628. D. C.—United States v. Gunnell, 5 Mack. 196. ILL.—Hoge v. People, 117 Ill. 35, 6 N. E. 796. IND.—

Albin v. State, 63 Ind. 599. MISS.—Nelms v. State, 58 Miss. 362. MO.—State v. Lewis, 69 Mo. 92. N. Y.—People v. Clements, 42 Hun 353, 5 N. Y. Cr. Rep. 282, modified on another point in 107 N. Y. 205, 13 N. E. 782. N. C.—State v. Byers, 80 N. C. 426. PA.—Turner v. Com., 86 Pa. St. 54, 27 Am. Rep. 683. TENN.—Davis v. State, 64 Tenn. (5 Baxt.) 612. TEX.—Long v. State, 11 Tex. App. 381; Bond v. State, 23 Tex. App. 180, 4 S. W. 580.

Compare: Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244, as cited above in footnote 2, this section.

⁷ ILL.—Hoge v. People, 117 Ill. 35, 7 N. E. 796. MISS.—People v. Lyons, 49 Miss. 78; Landrum v. State, 63 Miss. 107; Owens v. State, 63 Miss. 450. TENN.—Boyd v. State, 84 Tenn. (16 Lea) 148. TEX.—Smith v. State, 22 Tex. App. 196, 2 S. W. 542; Maines v. State, 23 Tex. App. 568, 5 S. W. 123.

⁸ See Jackson v. State, 69 Ala. 242; Goerson v. Com., 99 Pa. St. 388.

tions of law.⁹ Whether he can absolutely direct an acquittal or conviction is elsewhere considered.¹⁰

§ 1647. **MUST, IF REQUIRED, GIVE DISTINCT ANSWERS AS TO LAW.** When statutory provisions exist requiring the judge at nisi prius to give his opinion affirming or negating particular propositions, these provisions must be strictly followed, nor is it permissible for him to evade this duty by merely general statements of the law;¹ nor by statements which, though theoretically accurate, may mislead.² He is not bound, it is true, to expatiate on abstract and irrelevant themes,³ though these were correctly propounded to him by counsel;⁴ nor is he forced to adopt the language in which counsel may couch instructions prayed for, but may recast the propositions, and submit them in his own terms;⁵ nor is he, when an instruction

⁹ *Infra*, § 1731; *People v. Carrillo*, 70 Cal. 643, 11 Pac. 840.

¹⁰ *Infra*, § 1751; *supra*, § 1641.

¹ *ARK.*—*Palmore v. State*, 29 Ark. 248. *CAL.*—*People v. Sanford*, 43 Cal. 29. *FLA.*—*Dixon v. State*, 13 Fla. 631, 636. *GA.*—*Terry v. State*, 17 Ga. 204. *IOWA*—*State v. Jones*, 52 Iowa 150, 2 N. W. 1060. *LA.*—*See State v. Melton*, 37 La. Ann. 82. *ME.*—*See Cook v. Brown*, 39 Me. 443. *N. Y.*—*Foster v. People*, 50 N. Y. 598, 1 Cow. Cr. Rep. 508. *N. C.*—*State v. Christmas*, 51 N. C. (6 Jones L.) 471. *TEX.*—*Heath v. State*, 7 Tex. App. 464; *Myers v. State*, 9 Tex. App. 157; *Scott v. State*, 10 Tex. App. 112; *Irvine v. State*, 20 Tex. App. 12; *Riley v. State*, 20 Tex. App. 100.

² *State v. Grear*, 28 Minn. 426, 41 Am. Rep. 296, 10 N. W. 472.

³ *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526.

⁴ *Infra*, § 1735. *ALA.*—*King v. State*, 71 Ala. 712; and see *Gar-*

lick v. State, 79 Ala. 265; *Humbree v. State*, 81 Ala. 67, 1 So. 548.

ARK.—*Harris v. State*, 34 Ark. 469. *CAL.*—*People v. Walsh*, 43 Cal. 447. *GA.*—*McCoy v. State*, 15 Ga. 205; *Bird v. State*, 55 Ga. 317. *LA.*—*State v. Riculfi*, 35 La. Ann. 770; *State v. Hamilton*, 35 La. Ann. 1043. *ME.*—*State v. Pike*, 65 Me. 111; *State v. McDonald*, 65 Me. 465; *State v. Wilkerson*, 76 Me. 317. *MICH.*—*People v. Jones*, 24 Mich. 216. *MO.*—*State v. Ware*, 62 Mo. 597. *NEB.*—*Parrish v. State*, 14 Neb. 60, 15 N. W. 357. *N. Y.*—*People v. Cunningham*, 1 Den. 524, 43 Am. Dec. 709. *OHIO*—*Lewis v. State*, 4 Ohio 389; *Tabler v. State*, 34 Ohio St. 127. *ORE.*—*State v. Glass*, 5 Ore. 73. *TENN.*—*Wilson v. State*, 50 Tenn. (3 Heisk.) 278; *Honeycutt v. State*, 67 Tenn. (8 Bart.) 371.

⁵ *CAL.*—*People v. Cleveland*, 49 Cal. 578; *People v. Hope*, 62 Cal. 291. *COLO.*—*Dougherty v. Peo-*

asked for is partly correct and partly erroneous, bound either to affirm or repudiate it as a whole; but, as has been seen, he may restate, unless precluded by statute, the law in his own terms.⁶ Nor is he bound to leave to the jury a point incidentally made on the trial, if his attention be not specifically called to it by a prayer for instructions, and if he substantially covers the whole case in his charge.⁷

§ 1648. **ERROR FOR JUDGE TO EXCLUDE POINT FROM JURY UNLESS THERE IS NO EVIDENCE.** It is error for the judge, unless there be an entire absence of evidence to prove a particular grade of murder, to exclude such grade from the consideration of the jury.¹ But it is not error for him to express his opinion as to the grade of the offense reached by the case, provided the question of grade prop-

ple, 1 Colo. 514. GA.—Long v. State, 12 Ga. 293. ILL.—Wilson v. State, 3 Ill. (2 Scam.) 226; Needham v. People, 98 Ill. 275; Devlin v. People, 104 Ill. 504. IOWA—State v. Wilson, 8 Iowa 407; State v. Schlager, 19 Iowa 169. ME.—State v. Williams, 76 Me. 480. MICH.—People v. Marble, 38 Mich. 117; Ulrich v. People, 39 Mich. 245. MISS.—Boles v. State, 17 Miss. (9 Smed. & M.) 284; Mask v. State, 36 Miss. 77. MO.—State v. Wissmark, 36 Mo. 592. N. C.—State v. Shaw, 49 N. C. (4 Jones L.) 440. PA.—Pistorius v. Com., 84 Pa. St. 153. WIS.—Casper v. State, 47 Wis. 535, 2 N. W. 1117.

⁶ ARK.—Stanton v. State, 13 Ark. 318. CAL.—People v. Silvera, 59 Cal. 592. FLA.—Dixon v. State, 13 Fla. 636. ILL.—Kennedy v. People, 40 Ill. 438. IOWA—State v. Wilson, 8 Iowa 407. ME.—See State v. Benner, 51 Me. 267.

MASS.—Com. v. Costley, 118 Mass. 1. MISS.—Keithler v. State, 18 Miss. (10 Smed. & M.) 192. MO.—State v. Stonum, 62 Mo. 596. WIS.—State v. Downer, 21 Wis. 275.

⁷ Infra, § 1731. ALA.—Dave v. State, 22 Ala. 23; McKleroy v. State, 77 Ala. 95. MASS.—Com. v. Costley, 118 Mass. 1. N. C.—State v. O'Neal, 229 N. C. (7 Ired. L.) 251. TEX.—Davis v. State, 14 Tex. App. 645.

A statute requiring a charge to be in writing must be strictly followed.—Smurr v. State, 88 Ind. 504.

¹ MISS.—Harris v. State, 47 Miss. 318. N. Y.—McNevin v. People, 61 Barb. 307; Burdick v. People, 58 Barb. 51. OHIO—Adams v. State, 29 Ohio St. 412. PA.—See Lane v. Com., 59 Pa. St. 371.

As to taking a case absolutely from jury, see, infra, § 1751.

erly arises;² though the omission or refusal of the court to charge the jury upon a grade of homicide not authorized by the pleadings and proof is not error.³ But it is error to refuse to define the degrees when required, and the case invokes such definition.⁴

§ 1649. CHARGE MUST BE IN OPEN COURT, AND BEFORE PARTIES. It must, however, be kept in mind that all communications from judge to jury must be made in open court, and in presence of the parties. If any statements, material to the issue, be made by the judge to the jury, in the absence of the defendant and his counsel, and to the defendant's prejudice,¹ they will be ground for a new trial or reversal.² And it is error for the judge to alter his charge after the jury has retired, unless in open court, in the presence of the parties, in explanation of mistake.³

Other points relating to this topic will be hereafter discussed.⁴

§ 1650. WHEN STATUTE REQUIRES MUST BE WRITTEN. When a statute requires a charge to be in writing when delivered, and to be filed as delivered, the entire charge as filed must be in writing. An omission on the part of the court to comply with this requisite is fatal; nor is the defect supplied by reading to the jury part of a printed book, and noting the reference to such book on the charge as filed.¹ But where the statute only requires

² Johnston v. Com., 85 Pa. St. 54, 27 Am. Rep. 622.

Compare: State v. Dixon, 75 N. C. 275.

Such is his duty, unless forbidden by statute.—See Mahly v. State, 68 Mo. 315.

³ Chole v. State, 81 Ga. 424; Williams v. State, 50 Tenn. (3 Heisk.) 376.

⁴ Ibid.; Wynne v. State, 56 Ga. 113; State v. Burnside, 37 Mo. 343; State v. Wyatt, 50 Mo. 309.

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¹ This is a requisite.—See Doyle v. United States, 11 Biss. 100, 10 Fed. 269.

² Infra, § 1770. See Roberts v. People, 111 Ill. 340.

³ Hulse v. State, 35 Ohio St. 421; Gross v. State, 40 Tex. 520.

⁴ Infra, §§ 1732 et seq.

¹ Stephenson v. State, 110 Ind. 358, 59 Am. Rep. 216, 11 N. E. 360; Hopt v. People, 104 U. S. 631, 26 L. Ed. 878.

that the charge when made should be in writing, the court may read extracts from printed volumes without first copying them.² It has been held, however, too late to put the charge in writing after it is delivered;³ though the defendant may on trial waive the right to have the charge pre-written.⁴

² State v. Thomas, 34 La. Ann. 1084.

In this case Manning, J., in the Supreme Court, said: "The judge wrote his charge as requested, and read from the manuscript, but he had occasion to quote from Wharton, and read the passage from the book. He says he could

see no difference between reading from the printed pages of Wharton and copying and reading the copy. Nor can we."

³ Territory v. Gertrude, 1 Ariz. 74, 25 Pa. 473; People v. Ah Fong, 12 Cal. 345.

⁴ Territory v. Duffield, 1 Ariz. 58, 25 Pac. 476.

CHAPTER XCIII.

CONDUCT OF JURY.

I. SWEARING.

§ 1651. Jury must be shown to have been sworn.

II. CONDUCT DURING TRIAL; ADJOURNMENT AND DISCHARGE.

§ 1652. Misconduct of jury is a contempt.

§ 1653. In England juries may be discharged at discretion of court.

§ 1654. In this country separations and discharges allowed in cases less than capital.

§ 1655. — Otherwise as to capital cases.

§ 1656. Tampering with jury to be summarily punished.

§ 1657. Court can discharge jury in cases of surprise, when gross injustice would otherwise result.

§ 1658. Adjournment of court is ground for discharge.

§ 1659. — And so is sickness or eminent disqualification of juror.

§ 1660. In non-capital cases jury may be discharged at discretion of court.

§ 1661. Conflict of opinion in capital cases.

III. DELIBERATIONS OF JURY.

§ 1662. Jury must be secluded during deliberations.

1. *Swearing Officer.*

§ 1663. Officer must be duly sworn.

2. *Communications by Third Parties.*

§ 1664. Illegal communication with jury is indictable.

§ 1665. — Such communications ground for new trial.

3. *Food and Drink.*

§ 1666. Food and drink may be supplied to jury.

4. *Casting Lots.*

§ 1667. Casting lots may be ground for new trial.

IV. CURING IRREGULARITIES BY CONSENT.

§ 1668. How far consent will cure irregularities.

I. SWEARING.

§ 1651. JURY MUST BE SHOWN TO HAVE BEEN SWORN. It must appear from the record that the jury was duly sworn, such swearing being essential to empaneling.¹

¹ Carey v. State, 76 Ala. 78; Barlow v. State, 37 Ark. 61; Dresch v. State, 14 Tex. App. 175.

In an Alabama case we have the following: "That oath requires the jurors to be sworn, not only to well and truly try the issue joined between the State of Alabama and the defendant, but also a true verdict to render according to the evidence. The record in this case states, the jury 'were duly sworn to well and truly try the issue joined between the State of Alabama and the defendant, Joe Johnson.' If it were stated that the jury were duly sworn according to law, it might, perhaps, be presumed they were sworn in the form required by the statute, but as the oath administered is stated we can not presume that they were otherwise sworn. The oath stated leaves out an essential and substantive part of the oath required to be administered, to wit: 'and a true verdict render according to the evidence, so help you God.' Thus we see not only an essential, but the most impressive part of the oath was omitted; that part that directs the jurors to look to God for help in the discharge of their important and solemn duty—a duty in which the life of a human being was involved. This omission must necessarily render the verdict illegal, and insufficient to justify the fearful and terrible punishment to which the defendant is consigned by the sentence

and judgment of the court."—Peck, C. J., in Johnson v. State, 47 Ala. 62. See Jones v. State, 5 Ala. 666, 673; Allen v. State, 71 Ala. 5; Storey v. State, 71 Ala. 329; Walker v. State, 72 Ala. 218; Bivens v. State, 11 Ark. (6 Eng.) 455, 465; Harriman v. State, 2 G. Greene (Iowa) 270-283.

"Duly sworn," or "sworn according to law," however, is good, though if there be an erroneous specification of what this consists in, this is ground for reversal.—Peterson v. State, 74 Ala. 34; Johnson v. State, 74 Ala. 537.

As to exactness of oath, see, further, Commander v. State, 60 Ala. 1.

As to form of oath, see, further, State v. Owen, 72 N. C. 605; State v. Paylor, 89 N. C. 539, where it was held that the omission of "so help me God" was not fatal.

Mere formal inaccuracies in the oath can not be objected to after the case is closed.—Smith v. State, 63 Ga. 168; State v. Hargrove, 81 Tenn. (13 Lea) 178; Fitzhugh v. State, 81 Tenn. (13 Lea) 258.

Otherwise with substantial defects.—State v. Davis, 52 Vt. 376.

The rule may be regarded as settled that if the statement "duly sworn" is given, the oath will be presumed to be regular.—Anderson v. State, 34 Ark. 257; People v. Darr, 61 Cal. 554; Holland v. State, 14 Tex. App. 182.

In Virginia it is held that it is not necessary that the form of

II. CONDUCT DURING TRIAL: ADJOURNMENT AND DISCHARGE.

§ 1652. MISCONDUCT OF JURY IS A CONTEMPT. The jury, after being empaneled, is under the control of the court; and it is usual for the judge to caution its members to hold no conversation and receive no information with regard to the case on trial. Any misconduct in this or other respects will be immediately corrected, and if necessary punished, by the court, which possesses plenary powers for such a purpose.¹

§ 1653. IN ENGLAND JURIES MAY BE DISCHARGED AT DISCRETION OF COURT. "If the trial is not concluded on the same day on which it began," it is stated in the edition of Archbold's Pleading, published in 1871, "the judge has authority to adjourn it from day to day, without the defendant's consent.¹ In such case the jury, on a trial for treason or felony, are (and in all criminal cases may be) kept together during the night, under the charge of officers of the court; but in misdemeanors they are generally allowed to return to their homes for the night, being charged not to converse with any person on the subject of the trial.² Where the witnesses for the prosecution have all been examined, the court may order the case to be adjourned, and direct another trial to be proceeded with, in order to give time for the production of a thing essential to the proof deposited at a distance.³ And on a trial for murder, before Maule, J., at York, December, 1848, where, after the opening address of the counsel, it was discovered that in consequence of the detention of the railway train, the witnesses for the prosecution had not arrived in the city, the trial was adjourned, the jury was locked up, a fresh jury was called into the

oath should appear on the record.
—Lawrence v. Com., 71 Va. (30 Gratt.) 845.

¹ As to misconduct as ground for new trial, see, *infra*, §§ 1780 et seq.

¹ R. v. Stone, 6 T. R. 527, 530, 101 Eng. Rep. 684; R. v. Hardy, 24 St. Tr. 418.

² See R. v. Kinnear, 2 Barn. & Ald. 462.

³ R. v. Wenborn, 6 Jur. 267.

jury box, and another case was proceeded with.⁴ Where a juror was sworn in a wrong name, and the objection was taken before the verdict, the same learned judge, at the same assizes, intimated that the proper course was to discharge the jury, and try the prisoners again; although there being in that case a second indictment against the prisoners, such a course was there not necessary.⁵ It has been held that the trial must proceed, although in the course of the proceedings it is discovered that one of the jurors is related to the prisoner on trial, as that fact was a ground of challenge.⁶ Where a prisoner, indicted for felony, with whom the jury were charged, was by sudden illness rendered incapable of remaining at the bar, the jury were discharged, and the prisoner, on recovering, was tried before another jury;⁷ and in a case of misdemeanor, where the prisoner became ill and was carried out of court, the judge discharged the jury, being of the opinion that the consent of his counsel, that the case should proceed in the absence of the defendant, was not, under such circumstances, sufficient; and if a prisoner so taken ill recovers during the assizes, he may be put on his trial again—the proceeding being, of course, begun *de novo*.⁸

§ 1654. IN THIS COUNTRY SEPARATIONS AND DISCHARGE ALLOWED IN CASES LESS THAN CAPITAL. In this country, in misdemeanors, the unquestioned usage is for the jury, if the case can not be concluded in one session, to be allowed to separate, repairing for the recess to their respective homes, cautioned, however, not to communicate with others as to the trial.¹ In felonies, while the English practice is to refuse to permit such separation during recesses,² in the United States the practice is to permit such

⁴ R. v. Foster, 3 Car. & K. 201.

⁵ R. v. Metcalf, MS.

⁶ R. v. Wardle, 1 Car. & Mar. 647, 41 Eng. C. L. 351.

⁷ R. v. Stevenson, 2 Leach 546.

⁸ R. v. Streek, 2 Car. & P. 413,

12 Eng. C. L. 646; Jervis' Archbold, 17th ed. (1871), p. 162.

¹ *Infra*, §§ 1754-1756.

² *Ibid*.

separation in cases less than capital.³ Under what circumstances the jury may be discharged in consequence of inability to agree upon a verdict has been already considered.⁴

§ 1655. — OTHERWISE AS TO CAPITAL CASES. As to capital cases, there is great diversity of opinion; but while the weight of authority is that such separation should not be permitted, there is a growing tendency towards relaxation of this rule.¹

§ 1656. TAMPERING WITH JURY TO BE SUMMARILY PUNISHED. Tampering with the jury is not only a misdemeanor, but a contempt. It is, as will presently be more fully seen, a misdemeanor to submit, to jurymen sworn in a case, any information as to the case except with the sanction of the court, in the presence of both parties.¹ It is a misdemeanor in a jurymen knowingly to permit such communications.² The offense may be punished by indictment; or summarily, by attachment and imprisonment as for a contempt.³ If a verdict has been attained by the party in whose interest the communication was made, then, as will hereafter be fully seen, a new trial will be granted.⁴

§ 1657. COURT CAN DISCHARGE JURY IN CASES OF SURPRISE, WHEN GROSS INJUSTICE WOULD OTHERWISE RESULT. Can a jury be discharged or a jurymen be withdrawn during the trial of a case, if from any unexpected incident the case be brought to a stand-still? Here again we impinge

³ *Infra*, § 1757.

⁴ *Supra*, §§ 1366, 1426, 1436.

In Massachusetts it is the practice for the court to direct an officer, in case the jury has not agreed after a certain number of hours, to discharge them if they say they are unable to agree.—*Com. v. Townsend*, 37 Mass. (5 Allen) 218.

¹ *Infra*, §§ 1758-1760.

¹ *Infra*, § 1906.

² *Infra*, § 1664.

³ *Infra*, § 1902.

⁴ See, fully, *infra*, §§ 1762, 1771, 1776 and 1777.

As to plea of once in jeopardy, see, *supra*, § 1426.

on topics elsewhere abundantly discussed, and as to which opinions of courts are in irreconcilable conflict. First, it will be remembered, we meet the constitutional provision that no man shall be placed twice in jeopardy for the same offense; and on this the question arises whether there is any "jeopardy" until the verdict of the jury is given.¹ Next, as to cases not capital, in all jurisdictions, and even as to capital cases in those jurisdictions where the "jeopardy" is not considered to take place until verdict, we are arrested by the question whether the court, upon either party being surprised by sickness, or sudden failure of evidence, or other material casualty, can withdraw a juror, or discharge the jury. That such is the usual practice is elsewhere seen;² but in all such cases it must appear, to justify a discharge, that the party applying for it was really surprised—that no ordinary diligence and caution could have guarded against the surprise—and that, unless the court so interfere, a grossly unjust verdict

¹ See this point discussed at large, *supra*, §§ 1426, 1447.

"It would seem to be the better opinion that the discharge of the jury without giving a verdict is a matter of practice in the discretion of the judge at the trial, and that although the power with which he is thus invested ought not to be exercised without very strong reasons, yet that it may be exercised without any absolute 'necessity.'"—Archbold's C. P., 17th ed., 169. See *R. v. Charlesworth*, 2 F. & F. 326, 1 B. & B. 25.

In the English practice, a defense, founded on the improper discharge of the jury, can not be taken by plea, for the only pleas known to the law founded upon a former trial are pleas of a for-

mer conviction or a former acquittal for the same offense; but if the former trial has been abortive without a verdict, there has been neither a conviction nor an acquittal.—*Winsor v. R. L. R.*, 1 Q. B. 395, 35 L. T. (M. C.) 161 (Exch. Chamb.).

And the discretion exercised by the judge in this respect, at all events where he discharges the jury on the ground of necessity, of the existence of which necessity it is for him alone to determine, can not be reviewed in any way.—*Winsor v. R.*, L. R. 1 Q. B. 395, 35 L. T. (M. C.) 161 (Exch. Chamb.). See, *supra*, §§ 1406, 1445 et seq; *infra*, §§ 1753, 1760.

² *Supra*, §§ 1445 et seq; *infra*, § 1759.

might ensue. But the grounds of the necessity should, for the sake of caution, be spread on the record.³

§ 1658. **ADJOURNMENT OF COURT GOOD GROUND FOR DISCHARGE.** Under any circumstances, the closing of a term of court before verdict is a good ground for discharge in states where no verdict can afterwards be taken.¹

§ 1659. — **AND SO IS SICKNESS OR EMINENT DISQUALIFICATION OF JUROR.** Even by those courts where the constitutional provision is construed most strictly, such sickness of a juror as incapacitates him for further attention to the case is ground for withdrawing a juror, or, to put the motion in the shape which it now generally takes, for the jury's discharge.¹ The same course is taken when a juror becomes deranged;² and when the court and parties are surprised by the transpiring of some gross and eminent disqualification of a juror,—e. g., that he is an alien,—in those states in which this is an absolute statutory disqualification,³ or that he is unequivocally inter-

s ALA.—*Vincent, Ex parte*, 43 Ala. 402. ARK.—*McKenzie v. State*, 26 Ark. 334. IOWA—*State v. Redman*, 17 Iowa 329; *State v. Vaughan*, 29 Iowa 286. KY.—*O'Brien v. Com.*, 72 Ky. (9 Bush), 333, 15 Am. Rep. 715. LA.—*State v. Evans*, 21 La. Ann. 321. NEV.—*State v. Pritchard*, 16 Nev. 101. N. Y.—*People v. Reagle*, 60 Barb. 529. N. C.—*State v. Ephraim*, 15 N. C. (2 Dev. & B. L.) 162; *State v. Lytle*, 40 N. C. (5 Ired. L.) 58. TEX.—*Moseley v. State*, 33 Tex. 671.

As to discharging juror for incompetency, see, further, *supra*, § 1608.

In *Washington v. State*, 89 N. C. 535, 45 Am. Rep. 700, it was held

good ground to discharge a jury that a juror had fraudulently procured his admission on the panel in order to acquit the defendant.

¹ *Supra*, § 1450.

² See, *supra*, §§ 1445 et seq. MO.—*Hector v. State*, 2 Mo. 166, 22 Am. Dec. 454. TENN.—*Mahala v. State*, 18 Tenn. (10 Yerg.) 532, 31 Am. Dec. 591; *State v. Curtis*, 24 Tenn. (5 Humph.) 601. VA.—*Com. v. Fells*, 36 Va. (9 Leigh) 613. FED.—*United States v. Haskell*, 4 Wash. 402, Fed. Cas. No. 15321. ENG.—And see, also, *Kinloch's Case*, Fost. 28.

See, also, *infra*, §§ 1457, 1458.

³ *United States v. Haskell*, 4 Wash. 402, Fed. Cas. No. 15321.

³ *Stone v. People*, 3 Ill. (2 Scam.) 326; *infra*, §§ 845 et seq.

ested in the case, having improperly concealed this interest at the time of empaneling.⁴

§ 1660. IN NON-CAPITAL CASES JURY MAY BE DISCHARGED AT DISCRETION OF COURT. Can a jury be discharged on failure to agree? It will be sufficient, in answer to this question, to state the points already established in other relations.

(a) In misdemeanors, and in all felonies less than capital, it is in the discretion of the court to discharge the jury, when there is no reasonable prospect of their agreement, if they have been together a sufficient time to enable a just conclusion in this respect to be reached.¹

§ 1661. CONFLICT OF OPINION IN CAPITAL CASES. (b) In capital cases the same view is adopted in the federal courts and in the courts of most of the states; while in others such discharge is a bar to a second trial, unless it appear from the record that such discharge was necessary,—e. g., caused by dangerous sickness of juror.¹ Whether the prisoner can by consent cure the irregularity in such cases is elsewhere discussed.² Whether there was jeopardy is a question of law as to which error lies, though it is as a rule otherwise as to the question whether the fact of disagreement or other incapacitation was duly proved.³

⁴ Com. v. McFadden, 23 Pa. St. 12; United States v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14858; *infra*, § 1784.

¹ ALA.—Williams v. State, 45 Ala. 57. CONN.—State v. Woodruff, 2 Day 504, 2 Am. Dec. 122. MASS.—Com. v. Bowen, 9 Mass. 494; Com. v. Purchase, 19 Mass. (2 Pick.) 521, 13 Am. Dec. 452; Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; People v. Goodwin, 18 John. 187, 9 Am. Dec. 203; People v. Green, 13 Wend. 55. N. C.—State v. Bass,

82 N. C. 570; State v. Chase, 82 N. C. 575. OHIO—Sutcliffe v. State, 18 Ohio 469, 51 Am. Dec. 459; Dobbins v. State, 14 Ohio St. 493. TEX.—Mosely v. State, 33 Tex. 671. ENG.—Winsor v. R., 6 Best & S. 143, 118 Eng. C. L. 141.

See, also, cases cited *supra*, §§ 1366, 1426.

¹ *Supra*, §§ 1426-1456.

² *Supra*, §§ 1455, 1477; *infra*, §§ 1668, 1723, 1724.

³ See cases cited to § 1660. And see, also: MD.—State v. Leunig,

III. DELIBERATIONS OF JURY.

§ 1662. JURY MUST BE SECLUDED DURING DELIBERATION. As soon as the case is submitted to the jury, they are to be kept together, under the charge of an officer, in such a way as to be secluded from all communication with other parties, until they have agreed on a verdict, or it appear that it is impossible for them to agree.¹

What books or other instruments of proof the jury may take with them is hereafter discussed.²

It is the duty of the court to see that the jury are provided with medicine and other conveniences or necessities.³

1. *Swearing of Officer.*

§ 1663. OFFICER MUST BE DULY SWORN. The officer should be a sworn officer of the court, of if not, must be sworn specially to faithfully discharge the office imposed on him in the particular case. When the jury have been out with an unsworn officer, this is ground for a new trial, unless it appear affirmatively that no prejudice to the defendant resulted thereby.¹ And the better practice in all cases is to swear the officer "well and truly to keep the jury in some convenient and private place (or in certain rooms prescribed by the court), and not to suffer any

42 Ind. 541. KY.—Com. v. Olds, 15 Ky. (5 Lit.) 137. N. C.—State v. Alman, 64 N. C. 309. PA.—But see Com. v. Cook, 6 Serg. & R. 577, 9 Am. Dec. 465. VA.—Williams v. Com., 43 Va. (2 Gratt.) 567. FED.—United States v. Peres, 22 U. S. (9 Wheat.) 579, 6 L. Ed. 165; United States v. Morris, 1 Curt. 23, Fed. Cas. No. 15815; United States v. Haskell, 4 Wash. 402, Fed. Cas. No. 15321.

See, also, *supra*, §§ 1430 et seq.

¹ *Supra*, §§ 1660, 1661; *infra*, § 1753; State v. Leunig, 42 Ind. 541.

See criticisms by Sir James Fitz-Stephens in his Treatise on Criminal Law, p. 223; and also, In Matter of Newton, 13 Ad. & E. N. S. (13 Q. B.) 716, 66 Eng. C. L. 716.

² *Infra*, § 1768.

³ O'Shields v. State, 55 Ga. 696; *infra*, § 1666.

¹ *Infra*, § 1766.

person to speak to them, nor to speak to them yourself on the subject of the case, without leave of court."²

2. *Communications by Third Parties.*

§ 1664. **ILLEGAL COMMUNICATION WITH JURY IS INDICTABLE.** For third parties to communicate with a jury, when engaged in its deliberations, is an indictable offense, when such communication touches the subject-matter of the trial,¹ or such unauthorized communication may be treated

² *McCann v. State*, 17 Miss. (9 Smed. & M.) 465; *Phillips v. Com.*, 60 Va. (19 Gratt.) 485.

See, *supra*, §§ 338, 721, 1264, 1656; *infra*, § 1912.

This is substantially the oath approved by Lord Kenyon, in *R. v. Stone*, 6 I. R. 527.

¹ "At its last session," said Judge Field, of the Supreme Court of the United States, in charging a grand jury in California, in August, 1872 (*Pamph. Rep.*, p. 12), "Congress passed a stringent act to prevent the continuance of this pernicious practice, as well as to prevent any attempt to influence the administration of justice corruptly, or by the intimidation of jurors. It is entitled, 'An act to prevent and punish the obstruction of the administration of justice in the courts of the United States.' It enacts 'that if any person or persons shall corruptly, or by threats or force, or by threatening letters, or any threatening communications, endeavor to influence, intimidate, or impede any grand or petit jury or juror of any court of the United States in the discharge of his or their duty, or shall corruptly, or by threats or force, or by threatening letters, or any threatening communications,

influence, obstruct, or impede, or endeavor to influence, obstruct, or impede the due administration of justice therein, such person or persons so offending shall be liable to prosecution therefor by indictment, and shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both, according to the aggregation of the offense.' And it also enacts that 'if any person or persons shall attempt to influence the action or decision of any grand or petit juror upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his or their duties by writing or sending to him any letter or letters, or any communication in print or in writing, in relation to such issue or matter, without the order previously obtained of the court before which the said juror is summoned, such person or persons so offending shall be deemed guilty of a misdemeanor, and shall be liable to prosecution therefor by indictment or information, and shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not ex-

as a contempt of court.² Even irregular communications from the judge may vitiate the verdict.³

§ 1665. — **SUCH COMMUNICATIONS GROUND FOR NEW TRIAL.** It is doubted whether the reception of communications as to the case by itself avoids the verdict, in case of conviction, or whether it is necessary to prove prejudice to the defendant. The former is the better opinion,¹ as it can not be presumed that such communication was without influence in securing the result.

It is otherwise, however, when the communications do not touch the subject-matter of the trial. In such case the verdict will not be disturbed.² But if the jury are allowed to disperse, when deliberating, or are left without guard in the society of other persons, this is *per se* ground for a new trial.³

3. *Food and Drink.*

§ 1666. **FOOD AND DRINK MAY BE SUPPLIED TO JURY.** The old rule used to be that the jury, when the charge is committed to them, should be kept together without food.¹ This, however, no longer obtains, and the only point as to which doubt is expressed is as to whether the use of spirituous liquors at this period vitiates the verdict. It may indeed be a contempt to permit juries to take liquor without consent of court; but the preponderance of opinion is that, unless intoxication results, this is not ground for new trial.² As has been seen, the jury is to be provided with proper necessities and comforts.³

ceeding six months, or by both such fine and imprisonment, according to the aggravation of the offense.' You thus perceive that Congress intends that in the investigation of public offenses you shall be secure from intimidation or personal influence of every kind."

² *Infra*, § 1902.

³ *Supra*, § 1649; *infra*, § 1770.

¹ See, *infra*, §§ 1771-1778, 1898.

² *Infra*, §§ 1776, 1777; *State v. Bailey*, 32 Kan. 83, 3 Pac. 769.

³ *Infra*, §§ 1760-1772.

¹ *Ibid*.

On the question of consent of court, see *State v. Bailey*, 32 Kan. 83, 3 Pac. 769.

² *Infra*, § 1760.

³ *Supra*, § 1662; *O'Shields v. State*, 55 Ga. 696.

4. *Casting Lots.*

§ 1667. CASTING LOTS MAY BE GROUND FOR NEW TRIAL. Misconduct of this character is usually the subject of examination on motion for a new trial, under which head it is discussed.¹

IV. CURING IRREGULARITIES BY CONSENT.

§ 1668. HOW FAR CONSENT MAY CURE IRREGULARITIES. In England,¹ and in several American courts,² there has been a tendency to hold the defendant incapable of assenting to separation or similar indulgences of jurors during trial, sometimes because of the peculiar attitude of the defendant, which makes it improper to compel him to decide such delicate questions, and sometimes because the separation of a jury is so gross a violation of a fundamental law that no consent can legitimate it. It is difficult, however, to sustain either of these propositions to their full extent.³ No hesitation has been expressed as to requiring defendants to decide as to questions of consent, some of which are at least as delicate as that under consideration.⁴ Thus, it has been held that a defendant is permitted to waive a preliminary examination before a magistrate, no matter how much this may subsequently prejudice him;⁵ to waive, under statutory authority, a

¹ *Infra*, § 1782.

¹ *R. v. Woolf*, 1 Chit. 402, 18 Eng. C. L. 223. See, *supra*, § 1455.

² *Berry v. State*, 10 Ga. 511; *State v. Populus*, 12 La. Ann. 710; *Woods v. State*, 43 Miss. 364; *Peiffer v. Com.*, 15 Pa. St. 468, 53 Am. Dec. 605; *Wesley v. State*, 20 Tenn. (1 Humph.) 502.

All capital cases, except the one from Louisiana.

As to jeopardy, see, *supra*, § 1455.

As to separation of jury, see, *infra*, § 1760.

³ See, generally, *Johnson v. Com.*, 115 Pa. St. 360, 9 Atl. 78.

⁴ See *People v. Alviso*, 55 Cal. 230; *Perteet v. People*, 70 Ill. 171; *Bulliner v. People*, 95 Ill. 394; *State v. Waters*, 1 Mo. App. 7.

As to consent, on the general question, see 1 Kerr's Whart. Crim. Law, §§ 61 et seq.

As to question of jeopardy, see, *supra*, § 1455; *People v. Granice*, 50 Cal. 447; *State v. Potter*, 16 Kan. 80.

⁵ See, *supra*, §§ 111 et seq.

grand jury, even in felonies;⁶ to waive even the unconstitutionality of the law under which the grand jury was summoned;⁷ to waive the right to a copy of the indictment;⁸ to waive technical objections to jurors, though here, too, by a refusal his case may be prejudiced;⁹ to waive, in certain minor misdemeanors, his right to be present during trial;¹⁰ and to waive objections to evidence, under circumstances in which it might be in like manner forcibly urged that the election to which he is put is unfair, as to decline would exhibit him in an ungracious light before the jurors.¹¹ It has also been seen that the defendant, even in the view of those courts which attach the most stringent construction to the constitutional limitation as to jeopardy, is permitted to waive this right by a motion for a new trial, if not by a motion in arrest of judgment.¹² If we confine the question of separation to the period between the charge of the judge and the rendering of the verdict, and if we treat "separation" as convertible with "dispersion," then, no doubt, "separation" can not be legalized by consent, so as to permit a jury thus dispersed to reunite and return a verdict. But it is otherwise when we come to the question of separation during trial, but before the judge's charge, and are asked to decide that while such separation is allowable in misdemeanors, and even in non-capital felonies, it can not be cured even by consent in felonies that are capital. If, in a high felony, this privilege is not likely to be abused, it certainly will not be in capital cases, in which the jury are under peculiarly solemn sanctions. If the defendant is

⁶ *Edwards v. State*, 45 N. J. L. (16 Vr.) 419.

⁷ *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857; *supra*, § 1277; *infra*, § 1693.

⁸ *Supra*, § 1631.

⁹ See, *supra*, § 1278; *infra*, §§ 1785, 1827-1830; *State v. Waters*, 62 Mo. 196.

¹⁰ *Supra*, § 1777.

¹¹ *Infra*, § 1743.

As a strong case of this, *State v. Polson*, 29 Iowa 133.

¹² See, *supra*, § 1455; *infra*, §§ 1692, 1700.

As to scope of maxim, *Volenti non fit injuria*, see 1 Kerr's Whart. Crim. Law, §§ 184, 185.

anxious to conciliate in a capital case, so is he also in a high felony. To refuse to defendants this privilege of consenting to separation during trial will, in the long run, be oppressive rather than protective, for it will tend to force trials on with undue speed, and introduce into the jury box an inferior grade of jurymen.¹³ Hence it is that the weight of authority is that the defendant, even in capital cases, can legalize the separation of the jury during the recesses of the court, down to the period when the case is given to them for deliberation by the charge of the court.¹⁴ But such consent does not, unless as to minor offenses, under statutory authority, operate to legalize a trial by eleven instead of twelve jurors,¹⁵ although it has

¹³ See, *infra*, § 1758.

As to effect of consent, see, *supra*, § 1455.

¹⁴ See, *supra*, § 1455; *infra*, § 1758, and see *Smith v. Com.*, 14 Serg. & R. (Pa.) 70.

In *State v. Brown*, 75 Mo. 317, it was held that where the record was silent as to defendant's consent to separation, such consent would be presumed. Same principle held in *Henning v. State*, 106 Ind. 386, 55 Am. Rep. 756, 6 N. E. 803, 7 N. E. 4.

Compare: *Wesley v. State*, 30 Tenn. (11 Humph.) 502; *Grissom v. State*, 4 Tex. App. 374.

¹⁵ ALA.—*Bell v. State*, 44 Ala. 393. CAL.—*People v. O'Neill*, 48 Cal. 257. IND.—*Allen v. State*, 54 Ind. 461. MISS.—*Hunt v. State*, 61 Miss. 577. MO.—*State v. Davis*, 66 Mo. 684, 27 Am. Rep. 387. N. Y.—*Cancemi v. People*, 18 N. Y. 128, 7 Abb. Pr. 271.

In *State v. Kaufman*, 51 Iowa 578, 2 N. W. 275, such an agreement was sustained in a trial for felony.

In Texas such an agreement has

been sustained, as to misdemeanors.—*Jones v. State*, 14 Tex. App. 85.

Chief Justice Shaw, in *Com. v. Dalley*, 66 Mass. (12 Cush.) 83, where the court held that on a trial for assault and escape the defendant might agree to be tried by a jury of eleven, said, after citing *R. v. Sullivan*, 8 Ad. & E. 331, 35 Eng. C. L. 865: "It is asked, if consent will authorize a trial before eleven jurors, why not before ten, six, or one? It appears to us that it is a good answer to say that no departure from established forms of trial can take place without permission of the judge, and no discreet judge would permit any such extravagant or wide departure from those salutary forms as the question supposes, nor any departure unless upon some unforeseen or urgent emergency."

The guarantee in the federal constitution of "a public trial by an impartial jury" does not, it has been held, control state procedure.—*United States v. Cool-*

been held otherwise as to misdemeanors;¹⁶ nor can a defendant, according to the preponderance of authority, waive, even where there is an enabling statute, his right to a trial by jury on a plea of not guilty.¹⁷ And supposing

Idge, 14 U. S. (1 Wheat.) 415, 4 L. Ed. 124; Fox v. Ohio, 46 U. S. (5 How.) 410, 12 L. Ed. 213; United States v. Cook, 84 U. S. (17 Wall.) 168, 21 L. Ed. 538.

—Otherwise as to the fourteenth amendment, providing that a state shall not “deprive any person of life, liberty, or property without due process of law.”—Connolly v. State, 60 Ala. 89, 31 Am. Rep. 34; Sarah v. State, 28 Ga. 576; Murphy v. State, 97 Ind. 579.

16 GA.—Sarah v. State, 28 Ga. 576. KY.—Murphy v. Com., 59 Ky. (1 Metc.) 365; Tyra v. Com., 58 Ky. (1 Metc.) 1, 71 Am. Dec. 455. MASS.—Com. v. Dalley, 65 Mass. (12 Cush.) 80. MO.—State v. Van Matre, 49 Mo. 268. NEV.—State v. Barowsky, 11 Nev. 119. TEX.—Stell v. State, 14 Tex. App. 59.

17 ARK.—Wilson v. State, 6 Ark. 601; Bond v. State, 17 Ark. 290; Cooper v. State, 21 Ark. 228. CONN.—State v. Maine, 27 Conn. 281. MD.—League v. State, 36 Md. 259. MICH.—People v. Smith, 9 Mich. 193; Hill v. People, 16 Mich. 351. MO.—Neales v. State, 10 Mo. 498; State v. Mansfield, 41 Mo. 470. N. H.—Opinions of Justices, 41 N. H. 550. N. C.—State v. Stewart, 89 N. C. 563; State v. Holt, 90 N. C. 749, 47 Am. Rep. 544. OHIO.—Dillingham v. State, 5 Ohio St. 283; Williams v. State, 12 Ohio St. 622. WIS.—State v. Lockwood, 43 Wis. 403. Crim. Proc.—122

FED.—United States v. Taylor, 11 Fed. 470.

In State v. Worden, 46 Conn. 349, it was held that a statute was constitutional which provided that in all prosecutions the defendant could elect to be tried by the court instead of by the jury.

—To the same effect, see Connelly v. State, 60 Ala. 39, 31 Am. Rep. 31; Murphy v. State, 97 Ind. 579 (except in capital cases); Dally v. State, 4 Ohio St. 57; Dillingham v. State, 5 Ohio St. 280; Ward v. People, 30 Mich. 116.

In State v. White, 33 La. Ann. 1218, the right to waive such trial, under statute, was affirmed.

—So in Alabama.—See Wren v. State, 70 Ala. 1; Summens v. State, 70 Ala. 16.

—So in Iowa.—See State v. Carman, 63 Iowa 130, 50 Am. Rep. 741, 18 N. W. 691; State v. Larrigan, 66 Iowa 426, 23 N. W. 907 (both cases of felony).

—So in Texas.—See Bullard v. State, 38 Tex. 504; Stell v. State, 14 Tex. App. 59.

In State v. Conlin, 27 Vt. 318, it was intimated that the constitutional restriction applies only to high crimes.

For an examination of the cases, see note in 1 Am. Crim. Law Mag. 193.

In Dacre's Case, Kel. 59, 84 Eng. Repr. 1082, where Lord Dacre was tried for treason, one question was whether the prisoner might waive

it to be a fundamental principle of the common law that a jury, when its deliberations once commence, must be kept together in seclusion until they terminate, it must on like reasoning be held that consent does not validate a separation of the jury between the charge of the court and the verdict.¹⁸ The question as to separation during trial is one more open to doubt, and is hereafter independently discussed.¹⁹ But even a separation during trial, if improper on other grounds, can not be cured by an assent obtained from the defendant by solicitation. A party should not be forced into a choice between surrendering a right or exciting a prejudice in those by whom the case is

a trial by his peers and be tried by the country, but the judges of the Court of King's Bench agreed that he could not, for the statute of Magna Charta was in the negative, and the prosecution was at the king's suit.—See, also, 1 Wooddesson's Lect. 346; 3 Inst. 30; 8 Alb. L. J. 262; and see, *supra*, § 1455.

Failure to take technical objections at an earlier period does not waive right to writ of error.—*Infra*, § 1709.

¹⁸ *Supra*, § 1455. See, however, *Smith v. State*, 59 Ga. 513, 27 Am. Rep. 393.

As to general doctrine of consent, see 1 Kerr's Whart. Crim. Law, §§ 184-187.

In *Edwards v. State*, 45 N. J. L. (16 Vr.) 469, it was held that a statute was constitutional which permitted defendants to waive grand and petit juries in cases triable before certain courts.

—For same principle as to misdemeanors, see *Moore v. State*, 22 Tex. App. 117, 2 S. W. 634; *Staff, In re*, 63 Wis. 285, 23 N. W. 587.

In *Lavery v. Com.*, 101 Pa. St. 560, it was held that the statute of 1861, providing that assaults and other minor cases may be tried before a justice of the peace and six jurors, is not unconstitutional.—See *Com. v. Saal*, 10 Phila. (Pa.) 496.

In *State v. Lockwood*, 43 Wis. 405, it was said by Ryan, C. J.: "The right of trial by jury, upon information or indictment for crime, is secured by the constitution, upon a principle of public policy, and can not be waived." "The current of authority appears to apply it (its rule) to both classes of crime, felonies, and misdemeanors; and this point holds that to be safer and better alike in principle and practice." Same principle in *State v. Stewart*, 89 N. C. 563, affirming *State v. Moss*, 47 N. C. (2 Jones L.) 66.

In any view a statute taking away trial by jury without consent is unconstitutional.—See 1 Kerr's Whart. Com. Am. Law, §§ 754-766.

¹⁹ *Infra*, §§ 1758 et seq.

to be tried.²⁰ It is otherwise when the separation is at the defendant's request and for his benefit.²¹

How far the defendant may waive his right to be present at trial has been already considered.²²

²⁰ See cases cited supra, § 1455;
Peiffer v. Com., 15 Pa. St. 468, 53
Am. Dec. 605; Wesley v. State, 29
Tenn. (10 Humph.) 502; R. v. Kin-
near, 2 Barn. & Ald. 462.

²¹ Bebee v. People, 5 Hill
(N. Y.) 32.

²² Supra, §§ 1477 et seq.

CHAPTER XCIV.

VERDICT.

I. WHERE THERE ARE SEVERAL COUNTS.

§ 1669. In general.

§ 1670. Prosecutions may withdraw superfluous or bad counts.

§ 1671. General verdict when one count is bad, or when counts are repugnant.

§ 1672. New trial may be on single count.

§ 1673. Verdict of guilty on one count equivalent to not guilty on others.

II. DEFENDANT MUST BE PRESENT.

§ 1674. In general.

III. DOUBLE OR DIVISIBLE COUNT.

§ 1675. Verdict may go to part of divisible count.

IV. ADJOURNMENT OF COURT PRIOR TO.

§ 1676. In general.

§ 1677. Court may adjourn during deliberations of jury.

V. SPECIAL VERDICT.

§ 1678. Jury may find special verdict.

§ 1679. Such verdict must be full and exact.

VI. HOW VERDICT IS RENDERED.

§ 1680. General verdict is by word of mouth.

§ 1681. Verdict must be recorded.

VII. SEALED VERDICT.

§ 1682. In misdemeanors, sealed verdict may be rendered.

VIII. POLLING JURY.

§ 1683. Jury may be polled by either party.

IX. AMENDING VERDICT.

§ 1684. Verdict may be amended before discharge of jury.

X. DESIGNATION OF DEGREE OR OF PUNISHMENT.

§ 1685. Such designation must be specific.

XI. VALUATION OF PROPERTY.

§ 1686. Jury may find a special valuation.

XII. WHEN COURT MAY REFUSE TO RECEIVE VERDICT.

§ 1687. Palpably wrong verdict may be rejected by court.

XIII. WHEN THERE ARE SEVERAL DEFENDANTS.

§ 1688. Defendants may be severed in finding.

XIV. DEFECTIVE VERDICT.

§ 1689. Defective verdict may be inoperative.

XV. RECOMMENDATION TO MERCY.

§ 1690. Such recommendation not obligatory.

XVI. EFFECT OF SUNDAY OR LEGAL HOLIDAY RENDERING.

§ 1691. Not vitiated by being rendered on Sunday or holiday.

I. WHERE THERE ARE SEVERAL COUNTS.

§ 1669. **IN GENERAL.** The accurate practice in such case is for the jury to find specially on each count.¹ But as this, from carelessness or other cause, is often neglected, it becomes frequently incumbent on the courts to determine what course to take when a general verdict of guilty is rendered on the whole indictment. This subject has been heretofore generally discussed. It may be sufficient here to recapitulate the following rules:

¹ Day v. People, 76 Ill. 380; supra, § 342.

In such case there may be a sentence on each count.—See, *infra*, § 1850; also State v. Clark, 1 Bail. L. (S. C.) 66, 23 Am. Dec. 117.

Indictment charging more than one crime, or different degrees of the same crime, in separate counts, a general verdict of guilty is understood to find the highest crime, or the highest degree of the crime charged, where there is testimony

to support it.—State v. Core, 70 Mo. 491; State v. Glover, 27 S. C. 602, 4 S. E. 564; State v. Nelson, 14 Rich. L. (S. C.) 169, 94 Am. Dec. 130; State v. Kube, 20 Wis. 217, 91 Am. Dec. 390.

Plea of guilty refers to the graver offense charged, where several offenses are charged in the same indictment; but the rule prevails only as to those counts in the indictment which are good.—State v. Zimmerman, 79 S. C. 289, 60 S. E. 680.

§ 1670. PROSECUTION MAY WITHDRAW SUPERFLUOUS OR BAD COUNTS. When counts are joined for offenses which are different, but not positively repugnant,¹ and there is a general verdict of guilty, the practice is to sentence on the count of the highest grade, the prosecution either expressly or tacitly withdrawing the other counts;² and in such case, it appearing that the offenses were distinct aspects or successive stages of the same transaction, a sentence on the count for the highest grade is proper.³ But it is not irregular in most jurisdictions, when the offenses are distinct and there are separate verdicts, to sentence specifically on each count.⁴ And it has been held that a *nolle prosequi*, after verdict, on one of two repugnant counts on which the verdict is general, does not cure the defect.⁵

¹ Jackson v. State, 74 Ala. 26; Kilgore v. State, 74 Ala. 34.

Otherwise in cases of repugnancy, when there is nothing to indicate on what the verdict went.—Tobin v. People, 104 Ill. 565.

² Supra, §§ 341, 342, 1310; infra, §§ 1850, 1851. Also: Ga.—Estes v. State, 55 Ga. 131. ILL.—Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621. ME.—State v. Rounds, 76 Me. 123. MD.—Manly v. State, 7 Md. 135. MASS.—Com. v. Adams, 127 Mass. 15; Com. v. Flagg, 135 Mass. 545; Com. v. Holmes, 137 Mass. 248. N. J.—Cook v. State, 24 N. J. L. (4 Zab.) 843. N. C.—State v. Speight, 69 N. C. 72. S. C.—State v. Scott, 15 S. C. 434; State v. Smith, 18 S. C. 149.

See, also, cases cited infra, § 1851.

Defects in some courts will not affect the validity of the remain-

der.—Com. v. Miller, 2 Para. Sel. Eq. Cas. 480.

Court may quash such counts as are bad.—Com. v. Gouger, 21 Pa. Super. Ct. Rep. 217.

"The judgment may be granted upon the other count and restricted thereto, or a *nolle prosequi* may be entered as to one of the counts or more."—Peters, C. J., in State v. Rounds, 76 Me. 127. See State v. Thompson, 95 N. C. 596.

In a homicide case when the instrument of death is stated differently in different counts, the verdict need not specify which instrument was fatal.—Brown v. State, 105 Ind. 385, 5 N. E. 900; State v. Jackson, 90 Mo. 156.

³ Dohme v. State, 68 Ga. 339; Merrick v. State, 13 Ind. 327; Hawker v. People, 75 N. Y. 487, 2 Cow. Cr. Rep. 524.

⁴ Infra, § 1850.

⁵ Com. v. Haskins, 128 Mass. 60.

§ 1671. GENERAL VERDICT WHEN ONE COUNT IS BAD, OR WHEN COUNTS ARE REPUGNANT. When there is a good count and a bad count, and a general verdict of guilty, it has been held that a valid judgment can be entered on the verdict, which will be presumed in error to have been entered on the good count.¹ In some jurisdictions, however, a judgment entered on such a verdict will be reversed, as logically erroneous.² And there must in any

¹ See cases cited *supra*, §§ 341, 342; *infra*, §§ 1704, 1846. See *Williams v. State*, 60 Ga. 88; *Duffy v. State*, 107 Ill. 113, 47 Am. Rep. 431; *People v. Dalrymple*, 55 Mich. 519, 22 N. W. 20; see *Ridenour v. State*, 38 Ohio St. 272; *Boren v. State*, 23 Tex. App. 28, 4 S. W. 463.

One good count sufficient to sustain a sentence, where the evidence applies to that count.—*Com. v. McKisson*, 8 Serg. & R. (Pa.) 402, 11 Am. Dec. 630; *Hazen v. Com.*, 23 Pa. St. 355; *Henwood v. Com.*, 52 Pa. St. 424; *Hutchinson v. Com.*, 82 Pa. St. 472, 34 Phila. Leg. Int. 141; *Com. v. Wickert*, 19 Pa. Co. Ct. Rep. 251, 6 Pa. Dist. Rep. 387; *Com. v. Barge*, 11 Pa. Super. Ct. Rep. 164; *State v. Pace*, 9 Rich. L. (S. C.) 355; *State v. Kube*, 20 Wis. 217, 91 Am. Dec. 390; *Chase v. State*, 50 Wis. 510, 7 N. W. 376.

Reading wrong count to jury not ground for reversal on a general verdict of guilty.—*Grottkan v. State*, 70 Wis. 462, 36 N. W. 31.

² *Ibid.*

In Connecticut, in 1867, it was ruled (*supra*, § 292), that while it is in the discretion of a judge, in order to insure a fair trial, where there are several counts in an information, to direct the attorney

for the state to elect upon which counts he will claim a conviction, and to withdraw the others; or to direct the jury, when they return their verdict, to say upon which count or counts they find the prisoner guilty, yet this is a matter of discretion; and if the court do not take this course, the omission can not be revised, as matter of right, on motion in arrest or for a new trial; nor will the court interfere to grant a new trial, unless they see that injustice has been done.—*State v. Tuller*, 34 Conn. 281.

In Massachusetts it was ruled in 1869 that if, on the trial of an indictment charging distinct offenses, in separate counts, the jury return a general verdict of guilty, and, in answer to an inquiry of the court, reply that they did not pass upon the counts separately, and the verdict is thereupon ordered to be affirmed and recorded, the defendant has good ground for exception, even if the case was submitted to the jury with suitable instructions as to the several counts.—*Com. v. Carey*, 103 Mass. 214. See *People v. Lilly*, 38 Mich. 270.

In 1876 it was ruled in the same state that where the same offense is charged in several counts in in-

view be a reversal when evidence is admitted which is admissible only under the bad count.³ But when the counts are repugnant, a general verdict can not be sustained.⁴

§ 1672. NEW TRIAL MAY BE ON A SINGLE COUNT. When there is a new trial on one count alone, this leaves the other in full force. When there has been an acquittal on one count and a conviction on another, and the counts are for distinct offenses,¹ a new trial can only be granted on the count on which there has been a conviction.²

§ 1673. VERDICT OF GUILTY ON ONE COUNT EQUIVALENT TO NOT GUILTY ON OTHERS. A verdict of "guilty" on one count, saying nothing as to other counts, is equivalent to a verdict of "not guilty" as to such other counts;¹ and

consistent ways, a general verdict should be entered on the whole case, or a special verdict on the count proved, but that a special verdict of guilty on each count was bad.—*Com. v. Fitchburg R. Co.*, 120 Mass. 372.

"Where a complaint contains several counts, whether for the same or for different similar offenses, the plea, conviction, and sentence may be general, upon the complaint as a whole, and not upon each count separately."—*Com. v. Holmes*, 137 Mass. 248.

³ *Com. v. Andrews*, 132 Mass. 263; *Com. v. Boston R. R.*, 133 Mass. 383.

⁴ *Com. v. Haskins*, 128 Mass. 60; *United States v. Malone*, 20 Blatchf. 137, 9 Fed. 897.

See, *infra*, § 1849.

¹ See *United States v. Malone*, 20 Blatchf. 137, 9 Fed. 897.

² *Infra*, § 1836.

¹ *ALA.*—*Nabors v. State*, 6 Ala. 200. *FLA.*—*Green v. State*, 17 Fla.

669. *GA.*—*Trowbridge v. State*, 74 Ga. 431. *ILL.*—*Stoltz v. People*, 5 Ill. (4 Scam.) 168. *IND.*—*Weinzorpfm v. State*, 7 Blackf. 186; *Bittings v. State*, 56 Ind. 101; *Short v. State*, 63 Ind. 376; *Youndt v. State*, 64 Ind. 443; *Bonnell v. State*, 64 Ind. 498; *Dawson v. State*, 65 Ind. 445; *State v. Taylor*, 84 Ind. 773; *Keeling v. State*, 107 Ind. 563, 8 N. E. 559. *ME.*—*State v. Phinney*, 42 Me. 384; *State v. Watson*, 63 Me. 128. *MASS.*—*Edgerton v. Com.*, 87 Mass. (5 Allen) 514. *MISS.*—*Morris v. State*, 16 Miss. (8 Smed. & M.) 762. *MO.*—*State v. Coffee*, 68 Mo. 120; *State v. Owen*, 78 Mo. 367; *State v. Hays*, 78 Mo. 600; *State v. Gannon*, 11 Mo. App. 502. *N. Y.*—*Guenther v. People*, 24 N. Y. 100; *People v. Dowling*, 84 N. Y. 478. *PA.*—*Girtz v. Com.*, 22 Pa. St. 351; *Henwood v. State*, 52 Pa. St. 424. *OHIO.*—*Redenour v. State*, 38 Ohio St. 272. *VA.*—*Com. v. Bennett*, 4 Va. (2 Va. Cas.) 235; *Kirk v. Com.*,

when the jury fail to agree on a second count, but convict on the first, the defendant may be sentenced on the first.² But the better course is for the court to require a verdict on each count.³

II. DEFENDANT MUST BE PRESENT.

§ 1674. **IN GENERAL.** At the time of the rendition of the verdict, as a general rule, the defendant must be present in open court,¹ and in capital cases to take the verdict in his absence is a fatal error.²

III. DOUBLE OR DIVISIBLE COUNT.

§ 1675. **VERDICT MAY GO TO PART OF DIVISIBLE COUNT.** When two offenses are joined in one count,—e. g., burglary with larceny, and assault and battery with assault,—the verdict may be not guilty of the greater offense, and guilty of the less;¹ and so of a conviction of assault on a

50 Va. (9 Leigh) 627. **FED.**—United States v. Davenport, Deady 264, Fed. Cas. No. 14920.

Compare: Latham v. R., 5 Best & S. 635, 117 Eng. C. L. 633, 9 Cox C. C. 516; R. v. Craddock, 2 Den. C. C. 31.

A verdict of guilty on all the counts, and a sentence on one count, though erroneous, disposes of the case as to the other counts.—See Com. v. Foster, 122 Mass. 317, 23 Am. Rep. 326.

As to special verdict, a contrary rule prevails.—See, *infra*, § 1678.

As to informalities cured by verdict, see, *infra*, § 1693.

² State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Hill, 30 Wis. 416.

See, also, *infra*, § 1850.

³ State v. Jackson, 39 Ohio St. 37.

¹ *Supra*, § 1485; Longfellow v. State, 10 Neb. 105.

As to exceptions, see, *supra*, § 1485.

² Cook v. State, 60 Ala. 39, 31 Am. Rep. 31; Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281; State v. Chumley, 67 Mo. 41.

See, also, *supra*, § 1455.

¹ *Supra*, § 293; McCall v. State, 14 Tex. App. 353.

Assault with intent to commit murder being charged, accused may be convicted of murder in the second degree or of manslaughter (Brantley v. State, 9 Wyo. 102, 61 Pac. 130); or of an assault to commit manslaughter (Murphy v. State, 31 Ind. 511; State v. Throckmorton, 53 Ind. 354; State v. White, 41 Iowa 316, 20 Am. Rep. 602 (second edition); State v. Colligan, 17 N. H. 253) or of an assault to inflict great bodily harm (State v. Scheler, 52 Iowa 608, 3 N. W. 632); or of any other offense, not charged in terms, the

count charging a riot and an assault committed riotously.² It should be remembered, however, that at common law it has been held in some states that there can be no conviction of a misdemeanor on an indictment for a felony.³ Nor can there be ordinarily a conviction of a minor offense on an indictment in which it is not contained.⁴

commission of which is necessarily included in the commission of the offense charged (*State v. Johnson*, 3 N. D. 150, 54 N. W. 547), such as simple assault.—*Hunter v. Com.*, 79 Pa. St. 503, 21 Am. Rep. 83.

"An assault with intent to murder covers the intent to unlawfully kill with malice. An assault with intent to commit manslaughter includes only the intent to kill unlawfully without malice. The intent to kill unlawfully without malice is necessarily included in the intent to kill unlawfully with malice. Remove the ingredient of malice in the last and you have the first. It follows that an assault with intent to commit manslaughter is necessarily included in an assault with intent to murder. These views are supported by the following cases, which are directly in point upon the question."—*Beck, J.*, in *State v. White*, 41 Iowa 316, 20 Am. Rep. 602 (second edition), citing *People v. Kennedy*, 5 Cal. 133; *People v. English*, 30 Cal. 214; *People v. Coughton*, 44 Cal. 92; *State v. Nichols*, 8 Conn. 496; *Beckwith v. People*, 26 Ill. 500; *Wall v. State*, 23 Ind. 150; *State v. Waters*, 39 Me. 54; *State v. Phinney*, 42 Me. 384; *State v. Butmon*, 42 N. H. 490; *People v. Reno*, 40 Vt. 503.

As to murder, see 1 Kerr's Whart. Crim. Law, §§ 674 et seq.

As to rape, 1 Kerr's Whart. Crim. Law, § 746; supra, §§ 296, 298, 1165.

Under mayhem there may be conviction of assault.—*State v. Fisher*, 103 Ind. 530, 3 N. E. 379.

As to indictment for mayhem, see, supra, §§ 960-969.

2 *Com. v. Hall*, 142 Mass. 454, 8 N. E. 324.

3 Supra, §§ 298, 310; *Hall v. State*, 75 Tenn. (7 Lea) 685; *R. v. Woodhall*, 12 Cox C. C. 240.

A verdict under present Virginia practice may be taken for an assault, on an indictment for feloniously and maliciously cutting, etc., though the latter is a felony and the former a misdemeanor.—*Canada's Case*, 63 Va. (22 Gratt.) 899.

4 Supra, §§ 298, 310; *Reynolds v. People*, 83 Ill. 479, 25 Am. Rep. 410; *State v. Kegan*, 62 Iowa 106, 17 N. W. 179; *Barber v. State*, 39 Ohio St. 660; *Territory v. Dooley*, 4 Mont. 295, 1 Pac. 747; *Com. v. Moore*, 99 Pa. St. 570.

There can be no conviction of an assault on an indictment for riot unless the indictment avers the assault. See *Price v. People*, 9 Ill. App. 36; supra, § 1407.

See, also, footnote 1, this section.

Nor can there be a conviction of receiving stolen goods on an indictment for larceny.—*State v. Moultrie*, 33 La. Ann. 1146.

But as a general rule, when an offense is divisible, the jury may convict the defendant of part of the charge, and acquit as to the rest;⁵ or, after a general verdict of conviction, the attorney-general may enter a *nolle prosequi* as to one branch of the case, and the court may sentence on the other.⁶

—Otherwise as to affray alleging an assault.—*Thompson v. State*, 70 Ala. 26.

⁵ See, *supra*, §§ 198, 295, 296, 300, 310. See, also: DAK.—*People v. Odell*, 1 Dak. 197, 46 N. W. 691. IND.—*Richie v. State*, 58 Ind. 355; *Smith v. State*, 85 Ind. 553. KAN.—*State v. Watson*, 30 Kan. 281, 1 Pac. 770. LA.—*State v. McCort*, 23 La. Ann. 326; *State v. Griffin*, 34 La. Ann. 37; *State v. Gilkies*, 35 La. Ann. 53. MASS.—*Com. v. Morgan*, 107 Mass. 199. MICH.—*Hanna v. People*, 19 Mich. 316. MO.—*State v. Chumley*, 67 Mo. 41. N. H.—*State v. Willson*, 59 N. H. 139. PA.—*Com. v. Keenan*, 67 Pa. St. 203. TENN.—*Fanning v. State*, 80 Tenn. (12 Lea) 651. FED.—*United States v. Leonard*, 18 Blatchf. 187, 2 Fed. 669.

Verdict, under statutes, may be taken for attempts in all cases of substantive crime.—*Wolf v. State*, 41 Ala. 412; *State v. Bryant*, 41 Ark. 359; *State v. Wilson*, 30 Conn. 500; *Hill v. State*, 53 Ga. 125; *R. v. Reid*, 2 Den. C. C. 89; *R. v. Bird*, 2 Den. C. C. 94; *R. v. Hapgood*, L. R. 1 C. C. 221.

At common law this can not be, unless the attempt be averred in the indictment. See, *supra*, §§ 294-299, 1396.

In the United States courts the defendant may be found guilty of

an attempt, "when itself a separate offense," contained in a greater offense charged.—U. S. Rev. Stat. § 1035, 2 Fed. Stats. Ann., 1st ed., p. 352, 2 Fed. Stats. Ann., 2d ed., p. 690.

As to homicide, see 1 Kerr's Whart. Crim. Law, § 674.

Indictment alleged the production of abortion, and the consequent death of the victim, the jury found a verdict of guilty of the abortion, but did not agree as to the death proceeding therefrom, the prosecution offered to enter a *nolle prosequi* to that part of the indictment, upon which the jury afterwards acquitted on that averment. It was held that no exception could be taken to the receiving and recording the verdict.—*Com. v. Adams*, 127 Mass. 15.

See, further, *supra*, §§ 1396, 1408; *infra*, § 1873.

⁶ *Supra*, § 1310; *Jennings v. Com.*, 105 Mass. 586.

In California, a verdict, "guilty as charged in the indictment," when an indictment is for an offense, containing two or more grades, was once held to be void for uncertainty.—*People v. Baza*, 53 Cal. 690.

As sustaining such a verdict for the higher grade, see *People v. Gilbert*, 69 Cal. 108; *People v. Whitely*, 64 Cal. 211, 27 Pac. 1104.

On a count for burglary and larceny, a general verdict of guilty has been held to apply only to the burglary.⁷

The proper course, on such a trial, is for the jury, if they convict of the minor offense alone, to find a verdict of guilty of the minor, and not guilty of the major, but a verdict of guilty of the minor is treated as involving an acquittal of the major.⁸

In what case, on a count for a felony or other consummated offense, the jury can convict of an assault or attempt is elsewhere considered.⁹

When several articles are joined in the same count for larceny, the verdict may go to either.¹⁰ In libel, on a count charging composing and publishing, the defendant may be found guilty of publishing.¹¹ In mayhem, the defendant, if an assault be averred, may be convicted of an assault.¹² A conviction for assault may be had on an indictment for assaulting an officer.¹³

IV. ADJOURNMENT OF COURT PRIOR TO.

§ 1676. **IN GENERAL.** In addition to the points thus recapitulated, the following may now be noticed:

§ 1677. **COURT MAY ADJOURN DURING DELIBERATION OF JURY.** Even where the jury are to be kept together, without intercourse with third parties, until they agree, this is not the case with the judges, who may adjourn, and return to receive the verdict in open court.¹ Such is the necessary practice in cases where the trial continues over a day.² It would seem, also, that the court, in minor offenses, may order the clerk to discharge the jury if they

⁷ Roberts v. State, 55 Miss. 421.
Compare: Watkins v. State, 37 Ark. 370.

⁸ See, supra, § 1396.

⁹ Supra, §§ 298, 310, and cases cited in prior notes to this section.

¹⁰ Supra, §§ 301, 1406; Bell v. State, 48 Ala. 684.

¹¹ 1 Whart. Crim. Ev. (Hilton's ed.), § 134.

¹² Com. v. Blaney, 133 Mass. 371.

¹³ People v. Warner, 53 Mich. 78, 18 N. W. 563.

Supra, § 200.

¹ See, infra, §§ 1757-1759.

² 4 Black. Com. 361.

do not agree by a specific hour; and that a verdict subsequent to such hour will be set aside.³

In some states a verdict may be received after the close of the term.⁴

V. SPECIAL VERDICT.

§ 1678. JURY MAY FIND SPECIAL VERDICT. The jury are not confined to finding a verdict of "guilty" or "not guilty" on the general issue. They may find a special verdict setting forth the facts, and finding the defendant guilty or not guilty, as the court may decide.¹ "This," says Blackstone, "is where they doubt the matter of the law, and therefore choose to leave it to the determination of the court, though they have an unquestioned right of determining upon all the circumstances and finding a general verdict, if they think proper so to hazard a breach of their oaths." But this admonition fell without much effect on English practice;² with the consequent

³ *Com. v. Townsend*, 87 Mass. (5 Allen) 216; *Mass. Law Reg.* October, 1863, cited *Hilliard on New Tr.* (1873) 238.

⁴ *Supra*, § 1450.

¹ *State v. Stewart*, 91 N. C. 566. See article in 10 *Crim. L. Mag.* 11.

² See *McGuffie v. State*, 17 Ga. 497; *Com. v. Squires*, 97 Mass. 59; *Peterson v. United States*, 2 Wash. 36, *Fed. Cas. No.* 11036; *R. v. Hughes*, 1 H. & W. 313; *R. v. Suffolk*, 5 Nev. & M. 139, 36 Eng. C. L. 605.

Compare: *R. v. Francis*, 2 Stra. 1015, 93 Eng. Repr. 1004.

Right to find special verdict: "The jury have a right in all criminal cases to find a special verdict. Such verdict must state positively the facts themselves, and not merely the evidence adduced to prove them, and all the facts necessary to enable the court to give judgment must be found; for the

court can not supply by intentment or implication any defect in the statement."—2 Hawk., ch. 47, § 9; 2 East P. C. 708, 784; 1 Chitty *Crim. L.* 643. See *People v. Antonis*, 27 Cal. 404; *State v. Fooks*, 65 Iowa 196, 452, 21 N. W. 561, 773; *R. v. Royce*, 4 Burr. 2073, 98 Eng. Repr. 81; *R. v. Francis*, 2 Stra. 1015, 93 Eng. Repr. 1004.

"Thus where the indictment alleged that the defendant discharged a gun against the deceased, and thereby gave him a mortal wound, and the special verdict stated only that the defendant discharged a gun and thereby killed the deceased, not stating in terms that it was discharged against him; it was held that the court could not give any judgment against the defendant.—*R. v. Plummer*, Kel. 111, 84 Eng. Repr. 1103." (*Archbold's C. P.*, 17th ed., 164.)

result that now special verdicts are very rare. But it

As to other cases of special verdicts, see *R. v. Dawson*, 1 Stra. 19, 93 Eng. Repr. 358; *R. v. Francis*, 2 Stra. 1015, 93 Eng. Repr. 1004; *Egerton v. Morgan*, 1 Bulst. 69, 87, 80 Eng. Repr. 770, 786; *R. v. Kelte*, 1 Ld. Ray. 142, 91 Eng. Repr. 989.

—Special verdict is not amendable as to matters of fact; but a mere error of form may be amended, even as it seems, in capital cases, in order to fulfil the evident intention of the jury, where there is any note or minute to amend by.—2 Hawk., ch. 47, § 9; *R. v. Hayes*, 2 Stra. 844, 93 Eng. Repr. 888; *R. v. Woodfall*, 5 Burr. 2661, 98 Eng. Repr. 398; *R. v. Hazel*, 1 Leach 382.

As to correction of special verdicts in criminal causes, see note 23 L. R. A. 735.

If three offenses are charged in the indictment, and the special verdict state evidence which applies to two of them only, the court may adjudge the defendant guilty of those two, and enter an acquittal as to the residue.—*R. v. Hayes*, 2 Stra. 844, 93 Eng. Repr. 888.

Court can not, on an indictment for felony, adjudge the defendant guilty of a misdemeanor.—*R. v. Westbeer*, 2 Stra. 1133, 93 Eng. Repr. 1083.

See, however, *supra*, § 1675, footnote 1.

But where it appears clearly from the facts stated in the special verdict, that the defendant has been guilty of a crime, though not of the degree charged upon him in the indictment, the court will not discharge him, but direct a fresh indictment to be preferred.—*R. v.*

Francis, 2 Stra. 1015, 93 Eng. Repr. 1004.

Where the verdict is so imperfect that no judgment can be given upon it, a venire de novo may, in misdemeanor, be awarded (*R. v. Woodfall*, 5 Burr. 2661, 98 Eng. Repr. 398); and also, notwithstanding previous doubts upon the subject, in felonies (*Campbell v. R.*, 11 Ad. & E. N. S. (11 Q. B.) 799, 63 Eng. C. L. 799, 17 L. J. (M. C.) 89), in which case, says Blackburn, J., delivering judgment in *Winsor v. R.*, 35 L. J. (M. C.) 133, "there is a solemn decision of the Queen's Bench, not reversed or questioned, that a venire de novo will lie in a felony on an imperfect verdict."

"In cases of felony, the court may enter a judgment of acquittal, where the facts found by the special verdict do not warrant a judgment against the defendant. See *R. v. Huggins*, 2 Ld. Raym. 1573, 1585, 92 Eng. Repr. 518, 524; but this will be no bar to another prosecution for the same felony.—*R. v. Burridge*, 3 P. Wms. 439, 480, 24 Eng. Repr. 1133, 1148; Com. Dig. Indictment (N.)." (*Jervis' Archbold*, 17th ed. (1871) 164.)

See, also, article in the London Law Times of Dec. 6, 1884, p. 92.

Upon an indictment for stealing a watch, the jury returned the following verdict: "We find the prisoner not guilty of stealing the watch, but guilty of keeping it, in the hope of reward, from the time he first had the watch." It was ruled by the Court of Criminal Appeal, that this finding amounted to a verdict of "not guilty."—*R. v. York*, 1 Den. C. C. R. 335, 18 L. J. (M. C.) 38.

must be borne in mind that the right to find such a verdict, however, continues to be recognized.⁸

§ 1679. SUCH VERDICT MUST BE FULL AND EXACT. In stating a special verdict the facts must be summed up fully and exactly as on a special plea, and the omission of any fact,—e. g., venue or intent,—necessary to constitute the offense is fatal,¹ since the court can not supply

⁸ Com. v. Call, 38 Mass. (21 Pick.) 509, 32 Am. Dec. 284; State v. Wallace, 25 N. C. (3 Ired. L.) 195; State v. Moore, 29 N. C. (7 Ired. L.) 228; State v. Watts, 32 N. C. (10 Ired. L.) 369; State v. Curtis, 71 N. C. 56; State v. Bray, 89 N. C. 480; Lewer v. Com., 15 Serg. & R. (Pa.) 93; Com. v. Chatham, 50 Pa. St. 181, 88 Am. Dec. 539; Com. v. Eichelberger, 119 Pa. St. 254, 4 Am. St. Rep. 642, 13 Atl. 422; Com. v. Grestley, 18 Lanc. L. Rev. (Pa.) 222; Com. v. Keeler, 3 Pa. Dist. Rep. 185.

As to Louisiana practice, see State v. Jessie, 30 La. Ann. (pt. II) 1170.

Assault and battery with a deadly weapon with intent to kill, being charged, a verdict finding accused "guilty of assault and battery, with intent to kill," is partial and insufficient in not finding as to the use of a deadly weapon in the assault.—O'Leary v. People, 17 How. Pr. (N. Y.) 316, 4 Park. Cr. Rep. 187.

"Guilty of receiving and aiding in concealing stolen goods, knowing them to have been stolen, but not knowing them to have been burglariously stolen," is a special verdict, and insufficient in not finding that the goods described in the indictment were received by the accused.—Dyer v. Com., 40

Mass. (23 Pick.) 402. See Miller v. People, 25 Hun (N. Y.) 473.

More than is expressed in a special verdict, can not be imputed to it.—Miller v. People, 25 Hun (N. Y.) 473. See People v. Wells, 8 Mich. 104; Jones v. State, 31 Tenn. (2 Swan) 399.

De no apparentibus et non existentibus eadem est ratio et iudicium, applies to special verdicts.—People v. Wells, 8 Mich. 104.

Selling intoxicating liquors without authority or license charged, a special verdict to the effect that "the defendant made the sale as set forth in the indictment," is insufficient for the reason that it fails to show that the sale was unauthorized.—Com. v. Dooley, 72 Mass. (6 Gray) 360.

Verdict in nature of special verdict, not pronouncing affirmatively or negatively upon the facts necessary to enable the court to pronounce judgment, is insufficient, and the court should order the jury to "retire for further deliberation."—State v. Arthur, 21 Iowa 322; State v. Maxwell, 42 Iowa 208.

Verdict must conform to statute. See State v. Smith, 46 N. J. L. 491.

¹ ALA.—Clay v. State, 43 Ala. 350. MASS.—Com. v. Call, 38 Mass. (21 Pick.) 509, 32 Am. Dec. 284. N. C.—State v. Newby, 64 N. C. 23;

from its own knowledge any material fact which the jury should find;² and the practice is, when the verdict is in violent antagonism to the evidence, to set it aside and grant a new trial, if applied for by the defendant.³ If, however, the verdict in itself does not find facts from which guilt can be inferred, this is equivalent to a verdict of not guilty.⁴ Where a special verdict substantially avers facts constituting guilt, the court can pronounce upon the guilt of the defendant as a question of law; but if the facts found are equivocal, and are consistent with innocence, then the court can not determine as a question of law the guilt or innocence of the defendant.⁵ Thus in an information under the ninth section of the Internal Revenue Act, which enacts that any person who shall issue any instrument, etc., for the payment of money, without the same being duly stamped, with intent to evade the provisions of this act, shall forfeit and pay, etc., an intent to evade is of the essence of the offense, and no judgment can be entered on a special verdict which does not find such intent.⁶

State v. Curtis, 71 N. C. 56; State v. Blue, 84 N. C. 307. ENG.—R. v. Dawson, 1 Stra. 19, 93 Eng. Repr. 358.

See, also, cases cited, *infra*, § 1689.

As to form, see 1 Chitty Cr. L. 645.

² This applies even to averment of negatives.—Com. v. Dooly, 72 Mass. (6 Gray) 360.

Verdict must be confined to the facts proved. See Wall, *Ex parte*, 73 Ind. 95; Gaunt v. State, 81 Ind. 137; R. v. Huggins, 2 Ld. Raym. 1574, 92 Eng. Repr. 518.

³ IOWA—Arthur v. State, 21 Iowa 322. MASS.—Com. v. Call, 38 Mass. (21 Pick.) 509, 32 Am. Dec. 284. PA.—Com. v. Lewer, 15

Serg. & R. 93. S. C.—State v. Izard, 14 Rich. L. 209. ENG.—R. v. Maloney, 9 Cox C. C. 6; R. v. Meaney, L. & C. 213, 9 Cox C. C. 231.

In R. v. Woodfall, 5 Burr. 2661, 98 Eng. Repr. 398, it was held that a new trial would be granted on a defective verdict, and this was followed in the cases cited above. See, *infra*, §§ 1687-1689.

⁴ People v. Piper, 50 Mich. 390, 15 N. W. 523; State v. Custer, 65 N. C. 339; Short v. State, 15 Tenn. (7 Yerg.) 339.

⁵ State v. Curtis, 71 N. C. 56; State v. Bray, 89 N. C. 480; R. v. Francis, 2 Stra. 1015, 93 Eng. Repr. 1004.

⁶ United States v. Buzzo, 85 U. S. (18 Wall.) 125, 21 L. Ed. 812.

Surplusage in a special verdict may be disregarded.⁷

When a special verdict is defective, a venire de novo will be ordered.⁸

In Louisiana the only verdict can be "guilty" or "not guilty."⁹

VI. HOW VERDICT IS RENDERED.

§ 1680. **GENERAL VERDICT IS BY WORD OF MOUTH.** The usual mode of rendering a general verdict is by word of mouth. A written general verdict is irregular, and the court may reject it, and require it to be made orally.¹ In cases of felony, at least, an oral rendering by the foreman is essential.² The jury, when they have agreed, signify the fact by the foreman, and the clerk, directing the defendant to stand up, or to lift up his hand, addresses the jury and the defendant as follows: "Prisoner, look on the jury; jury, look on the prisoner: How say ye; is the prisoner guilty of the felony (or offense) whereof, he stands indicted, or not guilty?" The foreman, if there be a special verdict, reads it, or if the verdict be general, states it, "guilty," or "not guilty," as the case may be.³ The clerk then records the verdict, and again addresses the jury: "Harken to your verdict as the court hath recorded it: You say that A. B. is guilty (or not guilty) of the felony (or offense) whereof he stands indicted, and so you say all." This last declara-

⁷ *Wallace v. State*, 70 Tenn. (2 Lea) 29; *United States v. Stereoscopic Shades*, Spr. 467, Fed. Cas. No. 15927.

⁸ *State v. Bray*, 39 N. C. 480.

⁹ *State v. Jurche*, 17 La. Ann. 71.

¹ *Traube v. State*, 56 Miss. 154; *Timmons v. State*, 56 Miss. 786; *Lord v. State*, 16 N. H. 325, 41 Am. Dec. 729.

As to Louisiana, see *State v. Ross*, 32 La. Ann. 854.

As to Ohio statute requiring

written verdicts, see *Hardy v. State*, 19 Ohio St. 579.

As to Wisconsin, see *State v. Glass*, 50 Wis. 218, 36 Am. Rep. 345, 6 N. W. 500.

² *Com. v. Tobin*, 125 Mass. 203, 28 Am. Rep. 220.

³ *Rollins v. State*, 62 Ind. 46.

In Louisiana the verdict may be rendered by any one of the jury without the appointment of a foreman.—*State v. Faulk*, 30 La. Ann. (Pt. II) 831.

tion of the clerk is important, as fixing the character of the verdict, and preventing misconception.⁴

The verdict "guilty" is assumed to refer to the indictment to which it is a response.⁵

The procedure must be in open court, and in defendant's presence.⁶

§ 1681. VERDICT MUST BE RECORDED. That the verdict should be recorded is essential; but this may be done nunc pro tunc at a subsequent term.¹ That it was entered after the jury was discharged, at least in minor offenses, gives no ground for exception if they gave it in and assented to it before discharge.² If the record shows that less than twelve jurors assented, this is fatal.³

VII. SEALED VERDICT.

§ 1682. IN MISDEMEANORS, SEALED VERDICT MAY BE RENDERED. In misdemeanors, and in some states in felonies not capital,¹ the court may, with (and in some states without) the defendant's consent, permit the jury, after rendering a written verdict, to separate, and bring in such verdict when sealed into the court when it reassembles.² But though in such case the defendant may

⁴ Com. v. Gibson, 4 Va. (2 Va. Cas.) 70.

⁵ Bond v. People, 39 Ill. 26.

⁶ Supra, § 1485; State v. Mills, 19 Ark. 476; Com. v. Tobin, 125 Mass. 203, 28 Am. Rep. 220; Stubbs v. State, 49 Miss. 716; Finch v. State, 53 Miss. 363; State v. Epps, 76 N. C. 55.

¹ People v. Smith, 59 Cal. 601; Hall v. State, 3 Ga. 18; State v. Levy, 24 Minn. 362.

² People v. Gilbert, 57 Cal. 96; State v. Levy, 24 Minn. 362.

³ State v. Meyers, 68 Mo. 266. Supra, § 1668.

¹ See Sanders v. State, 2 Iowa 230, 278.

² ILL.—Reins v. People, 30 Ill. 256. IND.—Barlow v. State, 2 Blackf. 114; Bradley v. State, 31 Ind. 492. ME.—Anonymous, 63 Me. 590. MASS.—Com. v. Carrington, 116 Mass. 37; Com. v. Costello, 128 Mass. 88. PA.—Com. v. Boyle, 9 Phila. 592. FED.—United States v. Potter, 6 McL. 186, Fed. Cas. No. 16078.

Defendant's consent is necessary. See People v. Kelly, 46 Cal. 357.

As to separation, see, infra, § 1757.

As to form of sealed verdict, see Com. v. Carrington, 116 Mass. 37.

agree to a sealed verdict, it is error to permit the jury to leave such verdict with the clerk.³ The defendant is entitled to have them present at its rendition.⁴ The verdict must be written and sealed before the separation.⁵ If informal, it may be returned to the jury for correction.⁶

That a verdict is not signed, its genuineness being undisputed, is no ground for new trial.⁷

VIII. POLLING THE JURY.

§ 1683. JURY MAY BE POLLED BY EITHER PARTY. Either party may require that the jury, after announcing their verdict,¹ shall be polled,²—i. e., that the name of each

³ In *Com. v. Tobin*, 125 Mass. 203, 28 Am. Rep. 220, the jury upon a trial for manslaughter, being still out when the court adjourned for the day, were told by the court that they seal up their verdict and separate when they should agree, and bring it into court the next morning. This they did, and the sealed verdict was handed by the foreman of the jury to the clerk of the court, the prisoner being present. The clerk stated to them in the usual form that they found the prisoner guilty, and that this was their verdict. No response was made to this by the jury or their foreman, and nothing more was said. The proceedings were held by the Supreme Court to be erroneous. See *State v. Hornsby*, 32 La. Ann. 1268; *Com. v. Durfee*, 100 Mass. 146; *Com. v. Carrington*, 116 Mass. 37; *R. v. Vodden*, 6 Cox C. C. 226; *R. v. Parkin*, 1 Moo. 45.

⁴ *Fisher v. People*, 23 Ill. 283; *Martin v. Morelock*, 32 Ill. 485; *Wright v. State*, 11 Ind. 569; *Stewart v. People*, 32 Mich. 63; *Doyle v. United States*, 11 Biss. 100, 10 Fed.

269; *United States v. Potter*, 6 McL. 186, Fed. Cas. No. 16078.

See, also, *supra*, § 1485.

⁵ *Com. v. Doremus*, 108 Mass. 488.

⁶ *Sargent v. State*, 11 Ohio 472.

⁷ *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528; *United States v. Bennett*, 16 Blatchf. 338, Fed. Cas. No. 14571.

¹ *Cowart v. State*, 147 Ala. 137, 41 So. 631; *State v. Reppetto*, 66 Mo. App. 251, *State v. Sheets*, 89 N. C. 543.

² As to right of accused to poll jury, in the absence of statute, is supported by the decided weight of authority. See note, *Ann. Cas.* 1912B, 1236.

Act of polling may be done by the clerk, and not by counsel.—*Jackson v. State*, 147 Ala. 699, 41 So. 178.

Or it may be by court, in absence of clerk.—*Swan v. State*, 81 Miss. 453, 33 So. 223.

Answer of juror, in the process of polling, may be by a movement of the head.—*Brown v. State*, 141 Ala. 80, 37 So. 408.

juryman shall be specially called, and the question as to the defendant's guilt or innocence propounded to him individually; though in some jurisdictions the question proposed simply is, "Is this your verdict?"³ The same

Condition attached that jury should ask for clemency on part of court, on behalf of the defendant, does not deprive the verdict of its force.—*Bliss v. State*, 117 Wis. 596, 94 N. W. 325.

Explanations by juror asked if that is his verdict may be refused at that time and he required to answer "yes" or "no."—*State v. Tomlinson*, 7 N. D. 294, 74 N. W. 995.

"I submitted to it" being the reply of juror on poll, and in reply to question of court whether he assented to it, a reply that he did, held a sufficient showing that the verdict was his verdict.—*McAlpine v. State*, 117 Ala. 93, 23 So. 130.

Method of polling is by asking each juror individually if that is his verdict; to ask collectively is error for which a new trial must be granted.—*Brownlow v. State*, 112 Ga. 405, 37 S. E. 733. See *Prior v. State*, 77 Ala. 750; *Russell v. State*, 68 Ga. 785; *Blankenship v. State*, 112 Ga. 402, 37 S. E. 732; *Williams v. State*, 60 Md. 402; *Swan v. State*, 81 Miss. 453, 33 So. 223.

Motion to poll made after sentence has been pronounced, is made too late.—*Robinson v. State*, 109 Ga. 506, 34 S. E. 1017.

Motives influencing jury in bringing in their particular verdict—of manslaughter, on a charge of murder in the first degree—can not be inquired into.—*Jackson v. State*, 147 Ala. 699, 41 So. 178.

No demand of poll made, right

deemed waived.—*Hammer v. State*, 85 Md. 562, 37 Atl. 26.

Permission to poll required to be refused, an erroneous poll allowed, on which one of the jurors answered that he had not agreed, Supreme Court refused to reverse the cause and grant a new trial because of such answer on such poll.—*Harrison v. State*, 100 Ga. 264, 28 S. E. 38.

Premature demand for a poll where made on report that they could not agree.—*Cable v. State*, (Miss.) 38 So. 98.

Waiver of right to poll jury may be made in a misdemeanor case.—*Cowart v. State*, 147 Ala. 187, 41 So. 631.

³ GA.—*Tilton v. State*, 52 Ga. 478. IND.—*Wright v. State*, 11 Ind. 569. IOWA.—*State v. Callahan*, 55 Iowa 364, 7 N. W. 603. MD.—*Williams v. State*, 60 Md. 402. MISS.—*James v. State*, 55 Miss. 57, 30 Am. Rep. 496. N. Y.—*People v. Perkins*, 1 Wend. 91. N. C.—*John v. State*, 30 N. C. (8 Ired. L.) 330, 49 Am. Dec. 396; *State v. Young*, 77 N. C. 498. OHIO.—*Sargent v. State*, 11 Ohio 472. WIS.—*State v. Austin*, 6 Wis. 205. FED.—*United States v. Potter*, 6 McL. 186, Fed. Cas. No. 16077.

Substantial poll of jury is had when, on the return of the jury into court, they are asked if they have agreed upon a verdict, and, on an affirmative answer from the foreman, the verdict is handed to and inspected by the court, and then read to the jury by the clerk

power resides in the court of its own motion.⁴ If any jurymen dissent from the verdict previously expressed, then it is a nullity, and the jury must again retire for deliberation,⁵ though it is otherwise if the dissent be withdrawn,⁶ or if it consists in a mere expression of prior doubt not inconsistent with acquiescence.⁷

In Maine, Massachusetts, and Connecticut, under the practice by which the jury are asked orally whether each assents to the verdict, polling is held not to be a matter of right;⁸ and such is the view now taken in South Carolina.⁹ And this distinction is applicable to all states in which the practice is for the clerk to call upon the jurors individually as well as collectively for their verdict.

The better and prevailing view, however, is that when a sealed verdict is rendered the jury may be polled.¹⁰

of the court, followed by the inquiry on finishing the reading: "Is this your verdict?" answered by the foreman, and this followed by the further inquiry by the clerk: "So say you all?"—*Ryan v. People*, 50 Colo. 99, Ann. Cas. 1912B, 1223, 114 Pac. 306.

⁴ *Harris v. State*, 31 Ark. 196.

As to how far the question of polling the jury relates to that of grades of offense, see *Williams v. State*, 60 Md. 402, and cases cited, *infra*, § 1685.

Court not required to poll jury unless requested.—*State v. Colomb*, 108 La. 253; *State v. Burns*, 148 Mo. 167, 71 Am. St. Rep. 588, 49 S. W. 1005.

No poll except at request, is the general rule.—*State v. Cheney*, *Man. Unrep. Cas. (La.)* 394.

⁵ 2 Hale P. C. 299. ALA.—*State v. Brister*, 26 Ala. 107. ILL.—*Nomaque v. People*, 1 Ill. 109. KY.—*Burk v. Com.*, 28 Ky. (5 J. J. Marsh.) 676. S. C.—*State v. Hardin*, 1 Bail. L. 3. ENG.—*R. v.*

Vodden, 1 Dears. C. C. 229, 6 Cox C. C. 226; *R. v. Parkin*, 1 Moo. C. C. 45.

See *Hilliard on New Trials* (1873) 242.

⁶ *State v. Sheets*, 89 N. C. 543; *Gose v. State*, 6 Tex. App. 121.

See, also, *supra*, § 1682.

⁷ *State v. McKinney*, 31 Kan. 571, 3 Pac. 356; *Gose v. State*, 6 Tex. App. 121.

⁸ *State v. Hoyt*, 47 Conn. 518; *Fellow's Case*, 5 Me. 333; *Com. v. Roby*, 29 Mass. (12 Pick.) 496; *Com. v. Costley*, 118 Mass. 1.

⁹ *State v. Wise*, 7 Rich. L. (S. C.) 412.

¹⁰ *Wright v. State*, 11 Ind. 569; *Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78; *James v. State*, 55 Miss. 57, 30 Am. Rep. 496; *United States v. Potter*, 6 McL. 186, Fed. Cas. No. 16078.

For criticisms, see 1 *Crim. Law Mag.* 7; 1 *South. Law Jour. (N. S.)* 9, and 10 *Cent. L. J.* 1.

In *Brown v. State*, 63 Ala. 97, it was held that a defendant by

The right continues until the jury is finally dismissed.¹¹

IX. AMENDING VERDICT.

§ 1684. VERDICT MAY BE AMENDED BEFORE DISCHARGE OF JURY. Until the jury are discharged, the verdict may be amended. After they are discharged and separate, however, it is too late.¹ And if there is any informality, uncertainty, or impropriety about a verdict, the court may require the jury to amend it before they separate.² Even agreeing to a sealed verdict waives his right to poll.

See, to same effect, *United States v. Bridges*, U. S. Cir. Ct. Ala. 1879, 1 South. Law Jour. (N. S.) 8, 10 Cent. L. J. 7, Fed. Cas. No. 14644.

As to allowance of polling after sealed verdict.—*Doyle v. United States*, 11 Biss. 100, 10 Fed. 269; *United States v. Bennett*, 16 Blatchf. 338, Fed. Cas. No. 14571.

Absence of counsel does not vitiate.—*People v. Bennett*, 65 Cal. 267, 3 Pac. 868.

¹¹ *Brown v. State*, 63 Ala. 97; *Williams v. State*, 63 Ga. 306; *Russell v. State*, 68 Ga. 785.

But see *United States v. Bridges*, U. S. Cir. Ct. Ala. 1879, 1 South. Law Jour. (N. S.) 8, 10 Cent. L. J. 7, Fed. Cas. No. 14644.

¹ CAL.—*People v. Ah Ye*, 31 Cal. 451. GA.—*Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493. KY.—*Burk v. Com.*, 28 Ky. (5 J. J. Marsh.) 675. MASS.—*Com. v. Lang*, 76 Mass. (10 Gray) 11. OHIO—*Sargent v. State*, 11 Ohio 473. VA.—*Nemo v. Com.*, 43 Va. (2 Gratt.) 558. ENG.—*R. v. Voden*, 6 Cox C. C. 226, 1 Dears. C. C. 229.

As transcending the rule above given, see *Price v. Com.*, 74 Va.

(33 Gratt.) 819, 36 Am. Rep. 797, and see *State v. Disch*, 34 La. Ann. 1032.

² ARK.—*Ford v. State*, 34 Ark. 649. CAL.—*People v. Bonney*, 19 Cal. 426. FLA.—*Bryant v. State*, 34 Fla. 298, 16 So. 179; *Grant v. State*, 33 Fla. 298, 23 L. R. A. 735, 9 Am. Cr. Rep. 746, 14 So. 759. GA.—*Cook v. State*, 26 Ga. 593. MICH.—*People v. Farrell*, 146 Mich. 275, 109 N. W. 442. MISS.—*Gibson v. State*, 38 Miss. 295. MONT.—*In re Thompson*, 9 Mont. 388, 23 Pac. 934; *Morris v. Burke*, 15 Mont. 216, 38 Pac. 1068. NEV.—*State v. Waterman*, 1 Nev. 543. PA.—*Com. v. Chauncy*, 2 Ashm. 91; *Com. v. Houston*, 46 Pa. Sup. Ct. Rep. 221. TEX.—*Stell v. State*, 14 Tex. App. 59. VA.—*Nemo v. Com.*, 43 Va. (2 Gratt.) 558. ENG.—*R. v. Meany*, L. & C. 213, 9 Cox C. C. 231.

As to correcting verdict in criminal case, see note, 23 L. R. A. 723-737.

"The practice of directing a jury to reconsider their verdict, or ordering a venire de novo, is a harsh rule of the common law, which has been so far relaxed as not to apply to cases where the verdict in terms or effect amounts to an acquittal."—*Ashe, J., State v. Whitaker*, 89 N. C. 473.

where a verdict of "not guilty" was pronounced by one of the jurors, which was entered by the clerk in the minute-book, and the prisoner discharged, it was held that upon it appearing that the verdict the jury intended was "guilty," the record could be immediately amended, the verdict "guilty" recorded, and the prisoner committed.³ Mere formal incompleteness of verdict may be supplied by record.⁴ We will presently see that a defective verdict is no bar to further proceedings.⁵

X. DESIGNATION OF DEGREE OR OF PUNISHMENT.

§ 1685. SUCH DESIGNATION MUST BE SPECIFIC. Where a statute requires in the verdict a designation of a degree, or the specific assessment of a punishment, a general verdict, without such designation or assessment, will be a nullity, and if the jury are discharged, a second trial may be instituted, except in those jurisdictions where constitutional limitations are held to stand in the way.¹ The designation must be specific and in conformity with statute.² But when the indictment is for a single degree,

³ *R. v. Vodden*, 1 Dears. C. C. 229, 6 Cox C. C. 226.

To recall a jury immediately after rendering a verdict, to amend it, is not causing such a separation as avoids the verdict, though the jury were told they were discharged, and though the defendant objected to the recalling.—*Lovells v. State*, 32 Ark. 585; *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493.

To the same effect, *R. v. Par-kin*, 1 Moo. C. C. 45.

The verdict, as amended, is that which is to be recorded.—*Com. v. Dowling*, 114 Mass. 259; *R. v. Par-kin*, 1 Moo. C. C. 45.

⁴ *McInturf v. State*, 20 Tex. App. 230.

⁵ *Infra*, §§ 1689, 1696.

¹ ALA.—*Robertson v. State*, 42 Ala. 509. CAL.—*People v. Littlefield*, 5 Cal. 356; *People v. Welsh*, 49 Cal. 174; *People v. Brickley*, 49 Cal. 241. IND.—*Eastman v. State*, 54 Ind. 441. IOWA.—*Cropper v. United States*, Morr. 259. MD.—*Williams v. State*, 60 Md. 402. MASS.—*Com. v. McGrath*, 115 Mass. 150. MO.—*State v. Bean*, 21 Mo. 269; *State v. McCue*, 39 Mo. 112. OHIO.—*Dick v. State*, 3 Ohio St. 89; *Parks v. State*, 3 Ohio St. 101. TEX.—*Dubois v. State*, 13 Tex. App. 418. VA.—*Com. v. Hatton*, 44 Va. (3 Gratt.) 623; *Com. v. Scott*, 46 Va. (5 Gratt.) 697.

See, also, cases cited, *infra*, § 1689.

² *People v. Travers*, 73 Cal. 580, 15 Pac. 293; *Hughes v. State*, 65

a verdict of guilty as charged is a sufficient designation.³ A verdict imposing a greater punishment than that authorized by law is void;⁴ nor can the court ordinarily reduce a punishment so assessed,⁵ unless the assessment be divisible, in which case the illegal branch of the assessment may be stricken off.⁶ A punishment less than the statutory will ordinarily be sustained on error.⁷

A verdict for an "attempt" will not support a judgment for "assault."⁸

Where two defendants are jointly convicted and a fine imposed for the offense, this is a finding for the whole amount against each defendant.⁹

The designation of degrees in homicide is elsewhere noticed.¹⁰

Joint defendants may be convicted of different degrees.¹¹

XI. VALUATION OF PROPERTY.

§ 1686. JURY MAY FIND A SPECIAL VALUATION. It has elsewhere been seen¹ that wherever the sentence is affected by the value of property stolen, it is in the power of the jury, if they find the valuation in the indictment erroneous, to find a special valuation, which will bind the court. But it is not necessary, at common law for the jury in any case to value the chattels in larceny; and though they

Ind. 39; *Williams v. State*, 60 Md. 402; see *Timmons v. State*, 56 Miss. 786.

Presumption is for lower degree. See *Martin v. State*, 46 Ark. 38.

³ *Anderson v. State*, 65 Ala. 553.

⁴ *Ah Cha, Ex parte*, 40 Cal. 426; *Cropper v. United States*, Morr. (Iowa) 259; *Allen v. Com.*, 29 Va. (2 Leigh) 737.

⁵ *Cole v. People*, 84 Ill. 216.

⁶ *Infra*, §§ 1716, 1858, 1869.

⁸ So in Michigan.—*Wilson v. People*, 24 Mich. 410. *Infra*, § 1869.

⁷ *Infra*, § 1858.

⁸ *Fox v. State*, 34 Ohio St. 377.

⁹ *Infra*, § 1885; *Bennett v. State*,

80 Tex. 521.

¹⁰ *Infra*, § 1854; 1 *Kerr's Whart. Crim. Law*, § 676.

¹¹ *Mickey v. Com.*, 72 Ky. (9 Bush) 593; *Klein v. People*, 31 N. Y. 229.

See, also, *supra*, § 354; *infra*, § 1688; 1 *Kerr's Whart. Crim. Law*, §§ 276, 674.

12 *Kerr's Whart. Crim. Law*, § 1192.

have undoubtedly the power to do so if they choose, yet a general verdict of guilty is an affirmation of the value stated in the indictment, and is, therefore, for this purpose, sufficient.² In some states, it is true, the practice prevails for the jury, in larceny and the kindred offenses, to value the chattels;³ but unless this is required by statute valuation is superfluous.

XII. WHEN COURT MAY REFUSE TO RECEIVE VERDICT.

§ 1687. **PALPABLY WRONG VERDICT MAY BE REJECTED BY COURT.** In England the practice has been for the court, when a verdict plainly contradicts the evidence, or is founded on mistake of law, to refuse to receive it, and to direct the jury to take it back and reconsider it with renewed instructions. This course, for instance, has been followed in cases where the evidence required a verdict of either murder or of not guilty, but where the jury found manslaughter.¹ The course of refusing to receive a verdict, under such circumstances, may be traced to the fact that in England it is not the practice to revise verdicts by motions for new trial. In this country, however, where new trials are granted in all cases where a defendant is wronged by a verdict, it is unusual for a judge thus peremptorily to interfere.² But where a statute requires the jury to find the degree, then a general verdict will be refused by the court, and a verdict

² As to Texas practice, see *Collins v. State*, 6 Tex. App. 647.

³ *Case v. State*, 26 Ala. 17; *Highland v. People*, 2 Ill. (1 Scam.) 392; *State v. Redman*, 17 Iowa 329; *Locke v. State*, 32 N. H. 106.

As to Mississippi, see *Shines v. State*, 42 Miss. 331.

¹ *R. v. Meany*, 1 Leigh & C. 213, 9 Cox C. C. 231.

For other cases, see, *supra*, § 1679.

As to directing acquittal or conviction, see, *infra*, § 1744.

² *Supra*, §§ 1684, 1685. GA.—*Arnold v. State*, 51 Ga. 144. IND.—*State v. McGregg*, 4 Blackf. 101; *Heacock v. State*, 42 Ind. 393. N. C.—*State v. Shule*, 32 N. C. (10 Ired. L.) 153. TEX.—*Alston v. State*, 41 Tex. 39.

Compare: *State v. Underwood*, 2 Ala. 745.

finding the degree directed.³ And so where the verdict is insensible, and an amendment is required,⁴ or where the verdict is not as to the offense charged.⁵ In such case the jury is to be sent back, and directed to return a responsive verdict.⁶

XIII. WHEN THERE ARE SEVERAL DEFENDANTS.

§ 1688. DEFENDANTS MAY BE SEVERED IN FINDING. The law in this respect, as has been already stated,¹ may be thus recapitulated. When the charge is for a single offense, one defendant can not be found guilty of one part of the charge, and the other defendant of another part. It is otherwise, however, when the offense is capable of being divided into stages, as where the charge is burglary and larceny, in which case one defendant may be convicted of the larceny and the other of the burglary.²

In riot and conspiracy, as has been seen, there can not be a conviction of a single defendant, coupled with an acquittal of co-defendants, unless there is an allegation and proof of the co-operation of parties not indicted.³

A conviction of a joint offense, it must also be kept in mind, can only be on evidence of joint guilt.⁴ Adultery, however, when the woman was unconscious, is not a joint offense in this sense.⁵

Convictions of co-defendants are several,⁶ and the verdicts may be separate.⁷

³ *People v. Bonney*, 19 Cal. 426.
Supra, §§ 1684, 1685.

⁴ Supra, §§ 1684, 1685.

⁵ *State v. Bishop*, 73 N. C. 44.

⁶ *Ibid.*

¹ Supra, §§ 364, 365.

² Supra, §§ 363-366; infra, § 1815;

1 Whart. Crim. Ev. (Hilton's ed.), § 136.

³ Supra, §§ 355, 363; Whart. on Ev., § 131; 1 Kerr's Whart. Crim. Law, § 100; 2 *id.*, §§ 1655 et seq.

⁴ Supra, § 366.

⁵ *Com. v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248.

⁶ Supra, § 365; *Mask v. State*, 32 Miss. 406.

As to defective verdict, see *People v. Sepulveda*, 59 Cal. 342; infra, § 1689.

⁷ Supra, § 364; *Cruce v. State*, 59 Ga. 84; *State v. Bradley*, 30 La. Ann. 326.

The non-trial of one defendant can not be excepted to by another.⁸

XIV. DEFECTIVE VERDICT.

§ 1689. DEFECTIVE VERDICT MAY BE INOPERATIVE. A verdict defective in omitting an essential ingredient is a nullity,¹ and is no bar, as we have already seen, to a second trial on the same indictment, if there be no constitutional prohibition.² It was in the power of the defendant to have it corrected at the time it was rendered; and if he fail to do this, he can not afterward take advantage of his own laches.³ An insensible verdict, also, can be arrested on application of the defendant.⁴ But

⁸ Supra, § 364.

¹ Supra, §§ 1679, 1685.

IND.—Thedge v. State, 83 Ind. 126. MASS.—Com. v. Walsh, 132 Mass. 8. N. C.—State v. Whitaker, 89 N. C. 472; State v. Bray, 89 N. C. 480. TEX.—Doran v. State, 7 Tex. App. 385. W. VA.—State v. Newson, 13 W. Va. 859.

² ME.—State v. Scannel, 39 Me. 68. MASS.—Com. v. Call, 38 Mass. (21 Pick.) 509, 32 Am. Dec. 284. MISS.—Gibson v. State, 38 Miss. 295. MO.—Webber v. State, 10 Mo. 5. OHIO—Wilson v. State, 20 Ohio 26. TENN.—State v. Ragsdale, 78 Tenn. (10 Lea) 671, cited, infra, § 1722. VA.—Marshall v. Com., 46 Va. (5 Gratt.) 663. ENG.—R. v. Woodfall, 5 Burr. 2661, 98 Eng. Repr. 398; Campbell v. R., 11 Ad. & E. N. S. (11 Q. B.) 799, 63 Eng. C. L. 799.

See, also, cases cited to §§ 1455 and 1685.

Mere clerical errors will not make a verdict insensible.—People v. Boggs, 20 Cal. 432; Kellum v. State, 64 Miss. 226, 1 So. 174; Stewart v. State, 4 Tex. App. 527;

Williams v. State, 5 Tex. App. 226; Taylor v. State, 5 Tex. App. 569.

³ Supra, § 1684; Clay v. State, 43 Ala. 350; State v. Balk, 76 N. C. 10; State v. Blue, 84 N. C. 807.

See, also, supra, § 1679.

As to arresting judgment, see, infra, § 1695.

⁴ Supra, § 1685, 1687; infra, § 1696; David v. State, 40 Ala. 69; Westbrook v. State, 52 Miss. 777; State v. Whitaker, 89 N. C. 473.

As to statutory provisions, see People v. Coch, 53 Cal. 607; Harwell v. State, 22 Tex. App. 251, 2 S. W. 606.

As to venire de novo in such cases, see State v. Bray, 89 N. C. 480.

A special verdict, finding the defendant guilty of the same facts as those charged in the indictment, but not finding him guilty in the county where the offense was laid, can not be supported, and the defendant must again be put on his trial.—Com. v. Call, 38 Mass. (21 Pick.) 509, 32 Am. Dec. 284; supra, § 1678.

mere redundancy or surplusage does not vitiate⁵ provided the verdict be responsive;⁶ nor does mis-spelling, so long as the sense can be ascertained.⁷ But it has been held that a verdict of murder in the "first" degree, when the statute requires the degree to be specified, is a nullity.⁸ And so when on an indictment against two defendants the verdict found simply "the defendant" guilty.⁹ A prisoner, after conviction, is not entitled to be discharged on habeas corpus on the ground that the verdict was defective. His relief must be by motion to set aside the verdict, or for arrest of judgment, or, afterward, by writ of error.¹⁰

On the other hand, on an indictment for receiving goods, knowing them to be burglariously stolen, etc., a verdict of guilty of receiving the goods, knowing them to have been stolen, but not burglariously stolen, was held sufficient to sustain a sentence.—*Dyer v. Com.*, 40 Mass. (23 Pick.) 402; *supra*, §§ 304, 1679.

It is no ground for arrest of judgment that the defendants were convicted of different degrees of homicide (*supra*, § 1688); but otherwise when the verdict is for an offense not being necessarily included in the indictment.—*State v. Scannel*, 39 Me. 63.

For a wrong verdict the remedy is to move to set aside or to move for a new trial.—*State v. Snow*, 74 Me. 354; *State v. Watts*, 32 N. C. (10 Ired. L.) 369; *State v. Curtis*, 71 N. C. 56.

Judgment will not be arrested under the Massachusetts act on an indictment for larceny of "sundry bank bills, of the aggregate value of \$367," merely because the ver-

dict was "guilty of stealing sundry bank bills of the value of \$317," and not guilty as to the residue.—*Com. v. Duffy*, 65 Mass. (11 Cush.) 145.

⁵ *Veatch v. State*, 60 Ind. 291; *Traube v. State*, 56 Miss. 153.

⁶ *Territory v. Do*, 1 Ariz. 507, 25 Pac. 472; *State v. Disch*, 34 La. Ann. 1134; *State v. Murdock*, 35 La. Ann. 729.

⁷ *Supra*, §§ 322 et seq.; *State v. Smith*, 35 La. Ann. 1414; *Koontz v. State*, 41 Tex. 570; *Haney v. State*, 2 Tex. App. 504; *Hoy v. State*, 11 Tex. App. 32; *Wilson v. State*, 12 Tex. App. 481; *Walker v. State*, 13 Tex. App. 618.

⁸ *Wooldridge v. State*, 13 Tex. App. 443, 44 Am. Rep. 708.

⁹ *People v. Sepulveda*, 59 Cal. 342.

¹⁰ *Infra*, § 1696; *Waller v. State*, 40 Ala. 325, 333; *Dover v. State*, 75 Ala. 40.

As to waiver of formal defects, see *State v. Fenlason*, 78 Me. 495, 7 Atl. 385.

IV. RECOMMENDATION TO MERCY.

§ 1690. SUCH RECOMMENDATION NOT OBLIGATORY. The recommendation for mercy, when added to a verdict of guilty of an offense whose punishment is at the discretion of the court, is an appeal, in the first place, to the court,¹ and afterward to the pardoning authorities. But the recommendation is no part of the verdict, either in capital or non-capital offenses.² When, however, the court, as in capital cases, has no discretion as to the degree of punishment, the recommendation, as a mere collateral petition from the jury, is sent to the pardoning authorities direct.³

¹ *Infra*, § 1837.

² *Stephens v. State*, 51 Ga. 328; *State v. Vasquez*, 16 Nev. 42.

³ In *Com. v. Pomeroy*, 117 Mass. 143, the jury returned with their verdict of guilty, this paper, signed by all the jurors: "The jury recommend that the sentence be commuted to imprisonment for life on account of his youth." A general verdict of guilty was entered, and the defendant alleged exceptions to other rulings at the trial, but not to this, which on argument to the full court were subsequently overruled (*Com. v. Pomeroy*, 117 Mass. 143), and the defendant sentenced to death. Application was then made to the governor and council for a pardon. A certified copy of the record of the conviction and sentence was transmitted to the governor, and the original return of the jury, given above, with another paper also, returned at the same time, giving the grounds of the verdict. The justices of the court were then inquired of by the governor and council whether "the papers so transmitted were a part of the

judicial proceedings in said case, or of the record thereof, and what is their legal relation thereto." To which they unanimously answered: "A memorandum of the ground of the verdict, or of a recommendation to mercy, presented by the jury to the judges, can not affect the manner of returning, recording, or affirming the verdict, or the form of the sentence; and, in law, forms no part of the judicial proceedings in the case, or of the record thereof, and has no legal relation to the judicial proceedings or record." See *Opinion of the Justices*, 120 Mass. 600 (1876).

In the *Park Lane Murder case*, *Ann. Reg.* 1872, p. 209, the defendant was convicted of murder, but "strongly recommended to mercy on the ground that there was no premeditation in the act." But Baron Channell said, "It would be his duty to send the recommendation to mercy to the proper quarter, but at present all he had to do was to pass upon her the sentence of the law," and she was sentenced to death in the usual

XVI. EFFECT OF SUNDAY OR LEGAL HOLIDAY RENDERING.

§ 1691. NOT VITIATED BY BEING RENDERED ON SUNDAY OR HOLIDAY. The mere fact of a verdict being found and rendered on Sunday will not vitiate it when it is received and recorded on the next day.¹ Holding court on a legal holiday is a matter of discretion in the trial court.²

California rule, under statute, is different, and any business transacted by a court on a legal holiday,—except that which is enumerated in the statute,—is void. Hence the trial of one accused of crime on a legal holiday, or on a Saturday half-holiday, is illegal and void.³

form. In *People v. Lee*, 17 Cal. 76, the defendant was convicted of murder in the first degree, with a recommendation to mercy. The court directed the verdict to be entered without the recommendation, which, on appeal, was sustained, the court saying: "The recommendation was addressed solely to the court, and constituted no part of the verdict." See, also, *State v. O'Brien*, 22 La. Ann. 27; *State v. Bradley*, 6 La. Ann. 560.

In *State v. Potter*, 15 Kan. 303, the verdict as returned was "guilty of murder in the second degree," and with it these words, "and we recommend his punishment to be the least amount allowed by law." The court declined to receive the verdict in that form, and handed the jury another blank, which was duly signed and returned by them without those words. This was held no error.

See note to *Eason v. State*, 65 Tenn. (6 Baxt.) 466, in 17 Am. Law Reg. 313, from which the above is condensed.

In *Eason v. State*, 65 Tenn. (6

Baxt.) 466, 17 Am. Law Reg. 313, the Supreme Court of Tennessee ruled that the finding by one jury in a murder case of "guilty, with mitigating circumstances," where the court disregards the finding, and sentences the prisoner to the extreme penalty, does not bind a different jury in a subsequent trial, which may, on the contrary, find a verdict of "guilty" without mitigation.

¹ *Chamblee v. State*, 78 Ala. 466; *Meece v. Com.*, 78 Ky. 586; *State v. Ford*, 37 La. Ann. 344.

² *State v. Sorenson*, 32 Minn. 118, 19 N. W. 738.

³ *Matter of Smith*, 152 Cal. 566, 93 Pac. 191.

Trial on Saturday afternoon is in direct contravention of the provisions of the statute, and a conviction of murder in second degree was set aside for this reason in *People v. Heacock*, 10 Cal. App. 450, 102 Pac. 543.

The case coming up for retrial at nisi prius, on motion, the prisoner was discharged on the ground of former jeopardy.

CHAPTER XCV.

MOTION IN ARREST OF JUDGMENT.

- § 1692. At common law, most demurrable exceptions may be taken on motion in arrest.
- § 1693. Informalities are cured by verdict.
- § 1694. Misnomer no ground.
- § 1695. Under statute, right is restricted.
- § 1696. Insensible verdict will be arrested.
- § 1697. Pendency of prior indictment no ground for arrest.
- § 1698. Statute of limitations ground for arrest.
- § 1699. Irregularities of jury not ground for arrest.
- § 1700. Time and mode of motion are limited.
- § 1701. Sentencing defendant is equivalent to discharge of motion.

§ 1692. AT COMMON LAW, MOST DEMURRABLE EXCEPTIONS MAY BE TAKEN ON MOTION IN ARREST. At common law, and until 7 Geo. IV, ch. 64, secs. 20, 21, and the corresponding statutes in this country,¹ any objection which would have been fatal in demurrer was (with exceptions to be presently noticed) equally fatal on motion in arrest of judgment.² Judgment, however, can only be arrested for matter appearing on the record;³ though the motion is

¹ See, *supra*, §§ 131 et seq.

² 4 Bl. Com. 324; Burn's J., Indict., xl; 1 Chitty Cr. L. 442, 663. ALA.—*Francois v. State*, 20 Ala. 83; *Martin v. State*, 28 Ala. 71. KY.—*Tipper v. Com.*, 58 Ky. (1 Metc.) 6. ME.—*State v. Purnam*, 38 Me. 296; *State v. Bangor*, 38 Me. 592. MASS.—*Com. v. Morse*, 2 Mass. 128, 130; *Brown v. Com.*, 8 Mass. 59, 65; *Com. v. Child*, 30 Mass. (13 Pick.) 198. R. I.—*State v. Doyle*, 11 R. I. 574.

Defective indictment is not cured by a plea of *nolo contem-*

dere.—*Com. v. Northampton*, 2 Mass. 116; *supra*, § 1346.

Defective description of the offense is not one of the points in which an indictment is cured by a verdict, but the same is equally fatal on a motion in arrest of judgment as upon demurrer, or a motion to quash.—*Rice v. State*, 3 Kan. 141; *State v. Gove*, 34 N. H. 510.

³ 1 Ld. Raym. 281; 1 Salk. 77, 315; *Com. Dig. Indict. v. ALA.*—*Sparks v. State*, 59 Ala. 82. ARK.—*Walker v. State*, 35 Ark. 386.

not confined to the indictment alone, as it obtains if any part of the record is imperfect, repugnant, or vicious.⁴ Thus judgment will be arrested where no indictable offense is set forth;⁵ where the statute creating the offense has been intermediately repealed;⁶ where the case has been tried by more or less than twelve jurors;⁷ where no issue was averred to have been joined;⁸ and where the verdict is insensible;⁹ though as the court possesses the power of amending its own records at any time during the term in which they are entered,¹⁰ it seems that clerical errors, such as the false entering of a plea on an impossible day, may be corrected.¹¹

§ 1693. INFORMALITIES ARE CURED BY VERDICT. Errors as to form, not going to the description of the offense, which might have been taken advantage of at a previous stage, are not sufficient cause to arrest judgment.¹ Thus,

GA.—State v. Allen, Charl. 518. IND.—Shepherd v. State, 64 Ind. 43. LA.—State v. Frey, 35 La. Ann. 106. ME.—State v. Carver, 49 Me. 588. MD.—Horsey v. State, 3 Har. & J. 2; Byers v. State, 63 Md. 207. MASS.—Com. v. Donahue, 126 Mass. 51. MINN.—State v. Conway, 23 Minn. 291. MO.—State v. Connell, 49 Mo. 282. N. C.—State v. Craig, 89 N. C. 475, 45 Am. Rep. 698. TEX.—Johnson v. State, 14 Tex. App. 306; Walker v. State, 14 Tex. App. 609; Williams v. State, 20 Tex. App. 357. VT.—State v. Thornton, 56 Vt. 35. VA.—Com. v. Linton, 4 Va. (2 Va. Cas.) 476; Com. v. Watts, 31 Va. (4 Leigh) 672; Hall v. Com., 80 Va. 562.

⁴ 1 Chitty Cr. L. 662, 2 Stra. 901; 2 Taylor 93; State v. O'Connor, 11 Nev. 416; Whitehurst v. Davis, 3 N. C. (2 Hay.) 113; State v. Fort, 4 N. C. (1 Car. Law Repos.) 510.

⁵ Com. v. Hinds, 101 Mass. 209.

⁶ Brennan v. People, 110 Ill. 55; Com. v. Kimball, 38 Mass. (21 Pick.) 373; Com. v. McDonough, 95 Mass. (13 Allen) 581; United States v. Goodwin, 20 Fed. 237; R. v. Denton, 1 Dears. 3, 18 Ad. & E. N. S. (18 Q. B.) 761, 83 Eng. C. L. 761; R. v. McKenzie, R. & R. 429.

⁷ Supra, § 1668. See State v. Meyers, 68 Mo. 266.

⁸ State v. Fort, 4 N. C. (1 Car. Law Rep.) 510.

⁹ Com. v. Call, 38 Mass. (21 Pick.) 509, 32 Am. Dec. 284; supra, § 1689; infra, § 1695.

¹⁰ Supra, § 1684.

¹¹ Com. v. Chauncy, 2 Ashm. (Pa.) 91.

¹ Supra, § 343. GA.—Greene v. State, 59 Ga. 859. IND.—Coleman v. State, 111 Ind. 563, 13 N. E. 100. MASS.—Com. v. McMahon, 133 Mass. 394; Com. v. Flannigan, 137 Mass. 560. N. Y.—People v. Kelly, 94 N. Y. 526, 2 N. Y. Cr.

while duplicity is fatal on motion to quash, or demurrer, the better opinion is, that it will not be ground for arrest;² and the same position is undoubtedly good when there has been a misjoinder of counts, but where the defendant has gone to trial without a motion to quash, or on application for election.³ So the verdict will cure the omission to connect necessary and dependent members of the same sentence by their appropriate copulatives,⁴ and also merely formal or clerical errors.⁵ So it is with essential averments, of which the verdict implies the truth, but which are imperfectly stated. "There is a general rule as to pleading at common law, and I think it is right to say that there is no distinction, where questions of this kind arise, between the pleadings in civil and criminal proceedings," said Blackburn, J., in 1873; "that where an averment which is necessary to support a particular part of the pleading has been imperfectly stated, and a verdict on an issue involving that averment is found, and it appears to the court after verdict that unless this averment were true the verdict could not be sustained, in such case the verdict cures the defective averment, which might have been bad on demurrer. The authorities upon this subject are all stated in 1 Williams' Saund. 260, n. I (last ed.), 85 Eng. Repr. 307."⁶

Rep. 15, affirming 31 Hun 225. N. C.—State v. Walker, 87 N. C. 541; State v. Craige, 89 N. C. 475, 45 Am. Rep. 698. TEX.—West v. State, 6 Tex. App. 485. FED.—United States v. Gale, 109 U. S. 65, 27 L. Ed. 587, 3 Sup. Ct. 1. ENG.—R. v. Strowiger, L. R. 17 Q. B. Div. 327.

² Com. v. Tuck, 37 Mass. (20 Pick.) 356; State v. Johnson, 3 Hill L. (S. C.) 1. See, supra, § 304.

³ See, supra, §§ 294, 349; Guykowski v. People, 2 Ill. (1 Scam.) 476; States v. Watts, 82 N. C. 656;

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Com. v. Gillespie, 7 Serg. & R. (Pa.) 476.

Where two counts set forth the same offense judgment will be arrested.—Supra, § 349.

⁴ People v. Swenson, 49 Cal. 388; Lutz v. Com., 29 Pa. St. 441.

⁵ Supra, §§ 131, 322; West v. State, 6 Tex. App. 485.

⁶ Blackburn, J., Queen's Bench, Jan., 1873, in R. v. Heymann, 28 Law T. 163. See R. v. Heymann, 12 Cox C. C. 383, L. R. 8 Q. B. Div. 102. See, also, R. v. Bradlaugh (Ct. of Appeal), 38 L. T.

§ 1694. MISNOMER NO GROUND. It is clear that if misnomer of the defendant be not met by plea in abatement, it is too late for objection after trial.¹

§ 1695. UNDER STATUTE, RIGHT IS RESTRICTED. The rigor of the common law in this respect has been so greatly and so variously modified by statutes, that, so far as the pleading is concerned, few formal errors remain which motions in arrest of judgment can reach.¹ Errors

N. S. 118, L. R. 3 Q. B. Div. 607, 14 Cox C. C. 68, 21 Moak's Eng. Rep. 269, cited *supra*, § 222; case reversed L. R. 3 Q. B. Div. 607, 28 Moak's Eng. Rep. 482, 3 Am. Cr. Rep. 470.

In Massachusetts it was once held that as a rule the verdict does not cure defects that would be fatal in demurrer.—*Com. v. Child*, 30 Mass. (13 Pick.) 200; see *Com. v. Bean*, 80 Mass. (14 Gray) 54; *State v. Barrett*, 42 N. H. 466.

—This view has been modified by recent statutes.—See *Com. v. Tuck*, 37 Mass. (20 Pick.) 356; *Com. v. Adams*, 127 Mass. 15.

¹ *Com. v. Beckley*, 44 Mass. (3 Metc.) 330; *Com. v. Chauncy*, 2 Ashm. (Pa.) 90.

See, also, *supra*, §§ 162 et seq.

¹ Under 7 and 8 Geo. IV, which enacts that "where the offense charged has been created by any statute, the indictment shall, after verdict, be held sufficient if it describe the offense in the words of the statute," it was held that after verdict there could be no objection to an indictment which charged that defendant "unlawfully did receive goods which had been unlawfully and knowingly and fraudulently obtained by false pretenses with intent to defraud, well knowing that the goods had been ob-

tained by false pretenses with intent to defraud, as in this count before mentioned," but omitting to set out what the particular false pretenses were.—*R. v. Goldsmith*, 12 Cox C. C. 594; L. R. 2 C. C. 760; *R. v. Knight*, 14 Cox C. C. 31. And see *People v. Cox*, 9 Cal. 32; *Com. v. Pettes*, 126 Mass. 242.

Under U. S. Rev. Stat., § 1625, 2 Fed. Stats. Ann., 1st ed., p. 340, 2 Fed. Stats. Ann., 2d ed., p. 681, a technical defect in an indictment, not prejudicing the defendant, is no ground for arrest of judgment under plea of guilty.—*United States v. Chase*, 27 Fed. 807.

In most jurisdictions statutes exist providing that technical irregularities in pleading can no longer be considered ground for motions in arrest.—See: GA.—*Wise v. State*, 24 Ga. 31; *Camp v. State*, 35 Ga. 689; *Bostock v. State*, 61 Ga. 635; *Rataree v. State*, 62 Ga. 245. IND.—*Dillon v. State*, 9 Ind. 408; *Dawson v. State*, 65 Ind. 442. IOWA.—*State v. Raymond*, 20 Iowa 582. KAN.—*State v. Knowles*, 34 Kan. 393, 8 Pac. 861. KY.—*Walston v. State*, 55 Ky. (16 B. Mon.) 15; *Com. v. Hadcraft*, 69 Ky. (6 Bush) 91. LA.—*State v. Boudreaux*, 14 La. Ann. 88; *State v. Millican*, 15 La. Ann. 557. ME.—*State v. Snow*, 74 Me. 354. MD.—

which are of substance, however, are not cured by verdict.²

§ 1696. **INSENSIBLE VERDICT WILL BE ARRESTED.** Where the verdict itself is on its face insensible, the judgment may be arrested or set aside.¹

§ 1697. **PENDENCY OF PRIOR INDICTMENT NO GROUND FOR ARREST.** After a verdict of guilty on an indictment for murder, judgment will not be arrested because it appears on record that there was, at the time of the trial, another indictment against the defendant for the same offense, pending in the same court.¹

§ 1698. **STATUTE OF LIMITATIONS GROUND FOR ARREST.** Whether, where it appears on the face of an indictment

Cowman v. State, 12 Md. 250; *Maguire v. State*, 47 Md. 485. MO.—*State v. Pemberton*, 30 Mo. 376. N. Y.—*Gray v. People*, 21 Hun 140. PA.—*Lynch v. Com.*, 88 Pa. St. 189, 32 Am. Rep. 445. TENN.—*Perkins v. State*, 67 Tenn. (8 Baxt.) 559. TEX.—*Friedlander v. State*, 7 Tex. App. 204.

In Indiana the range of this motion is still further limited.—*Shepherd v. State*, 64 Ind. 43.

In Massachusetts, matters concerning the jurisdiction of the court can be overhauled by this motion.—Gen. Stat. 1864, ch. 250, § 3.

In Ohio, the motion is only allowable where the grand jury had no jurisdiction, and where the facts stated by the indictment constitute no offense.—Code Crim. Prac., § 195; *Warren's C. L.* (1870), § 195.

In Pennsylvania, by the Revised Acts of 1860:—

Cure of Defects in Jury Process by Verdict.—No verdict in any criminal court shall be set aside,

nor shall any judgment be arrested or reversed, nor sentence delayed, for any defect or error in the precept issued from any court, or in the venire issued for the summoning and returning of jurors, or for any defect or error in drawing, summoning, or returning any juror or panel of jurors; but a trial, or an agreement to try on the merits, or pleading guilty, or the general issue, in any case, shall be a waiver of all errors and defects in or relative or appertaining to the said precept, venire, drawing, summoning, or returning of jurors.—Rev. Acts, 1860, p. 443. See, as applying this act, *Com. v. Frey*, 14 Wright (Pa.) 245.

With these statutes are blended in practice the various statutes of jeofails and amendment, which have heretofore been examined.—*Supra*, §§ 131 et seq.

² *Supra*, § 1326; *State v. Palmer*, 32 La. Ann. 565; *Com. v. Moore*, 99 Pa. St. 570.

¹ *Supra*, § 1689.

¹ *Com. v. Murphy*, 65 Mass. (11 Cush.) 472; *supra*, § 1382.

that the offense charged is barred by the statute of limitations, and none of the exceptions in the statute to prevent its operation are alleged therein, judgment will be arrested, is elsewhere considered.¹

§ 1699. **IRREGULARITIES OF JURY NOT GROUND FOR ARREST.** Irregularities in respect to grand juries, unless matter of record, are not ground for arrest.¹ And where it appears from the statement on the face of the indictment that the grand jury were sworn, it is not competent on a motion in arrest of judgment, to disprove the recital by testimony aliunde.² Nor can errors not of record, in drawing of petit jury, be taken advantage of by such motion.³ Nor is it ground for arrest that exempted persons served on the jury.⁴

§ 1700. **TIME AND MODE OF MOTION ARE LIMITED.** At common law the motion may be made at any time before sentence;¹ but rules of court are adopted in most jurisdictions, requiring the motion to be made within four days after verdict. These rules, however, it is within the discretion of the court, in strong cases, to extend or vacate. The motion must point out the specific defects.²

§ 1701. **SENTENCING DEFENDANT EQUIVALENT TO DISCHARGE OF MOTION.** The correct course is to enter on the record the judgment of the court in declaring that the rule is either discharged or made absolute. But this is not imperatively necessary, as the sentencing of a prisoner, on the face of a motion in arrest, will be regarded by a court in error as a discharge of the rule.¹

¹ Supra, §§ 367 et seq.

¹ Supra, §§ 1272, 1277, 1280; United States v. Gale, 109 U. S. 65, 27 L. Ed. 857, 3 Sup. Ct. 1.

² Terrell v. State, 9 Ga. 58.

³ State v. Beasley, 32 La. Ann. 1162; Munshower v. State, 56 Md. 514; infra, § 1827.

⁴ Supra, § 1627.

¹ 1 Chitty Cr. L. 662, 663, citing King v. Holt, 5 T. R. 436, 445, 101 Eng. Repr. 245, 250; R. v. Robinson, 2 Burr. 801, 97 Eng. Repr. 568; R. v. Hayes, 2 Str. 845, 93 Eng. Repr. 888.

² State v. Bryan, 89 N. C. 531.

¹ Weaver v. Com., 29 Pa. St. 445.

CHAPTER XCVI.

WRIT OF ERROR.

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XI. REMOVAL TO FEDERAL COURTS.

§ 1720. Such removal provided for by statute.

I. TO WHAT COURTS.

§ 1702. **MUST BE TO A COURT OF RECORD.** A writ of error is a writ issuing from an appellate court commanding a subordinate court of record to send up to such appellate court the entire record of a contested procedure. A court not of record can not be reached by writ of error. The mode of revising the procedure of such courts is by certiorari,¹ which, however, only brings up the record.²

§ 1703. **PRACTICE IN FEDERAL COURTS.** By the judiciary act of 1798, the appellate jurisdiction of the Supreme Court of the United States was limited to civil cases; and this exclusion of revision by the supreme court of criminal cases is explained by Judge Story, on the ground that "if every party had a right to bring before this

¹ Tarleton, Ex parte, 2 Ala. 35; Wilde v. Com., 43 Mass. (2 Met.) 408; Snell, In re, 31 Minn. 110, 16 N. W. 692; Com. v. Morey, 30 Leg. Int. (Pa.) 141; 1 Wms. Saunders 101, note, 85 Eng. Repr. 109; R. v. Paty, 2 Salk. 503, 91 Eng. Repr. 431.

Court of equity has no jurisdiction to stay or enjoin criminal proceedings.—Sawyer, In re, 124 U. S. 200, 31 L. Ed. 402; 8 Sup. Ct. 482; 1 Spence Eq. Jur. 689; 2 Hall P. C. 147.

For history of writ of error in Pennsylvania, see remarks of Pax-

son, J., in Sayres v. Com., 88 Pa. St. 291.

Compare: Brightly's Troubat & Haly's Practice, § 885.

No writ of error lies in criminal cases from the United States Supreme Court to the Circuit Courts; the only mode of appeal being on a certificate of division, writ of habeas corpus or certiorari.—See discussion in Lange, Ex parte, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872; infra, §§ 1705, 1926, 1931.

² People v. Blake, 54 Mich. 239, 19 N. W. 969. See State v. Kennedy, 89 N. C. 589; Com. v. Kryder, 1 Pa. St. 143.

(the supreme) court every case in which judgment had passed against him for a crime, or misdemeanor, or felony, the course of justice might be materially delayed and in some cases frustrated."¹

Until 1879, no revisory jurisdiction over the district courts was given to the circuit courts; but by the act of 1879, a writ of error lies to the circuit courts to revise all criminal trials in the district courts where the sentence is imprisonment or fine exceeding three hundred dollars. In such cases the decision of the circuit court is final.² It is true that, as we will see, a writ of habeas corpus may issue from the supreme court in all cases in which the court imposing sentence is without jurisdiction;³ but otherwise the supreme court can not revise the decision of a circuit court except in the single case in which the judges of this court are divided in opinion, and even in this case, only on the points as to which the division of opinion exists.⁴

Under sec. 709 of the Revised Statutes,⁵ an application may be made to the Supreme Court of the United States for writ of error to a state court, in cases where the action of the latter court conflicts with the federal constitution.⁶

Regulated by Federal Judicial Code now, which should be consulted and requirements conformed to.⁷

II. HOW FAR ONE BAD COUNT AFFECTS A GENERAL CONVICTION, ON ERROR.

§ 1704. WHEN BAD COUNT MAY VITIATE JUDGMENT. For years it was the prevailing practice in England and this

¹ Kearney, *Ex parte*, 20 U. S. (7 Wheat.) 39, 5 L. Ed. 391. See, *infra*, § 1943.

² Gordon, *Ex parte*, 66 U. S. (1 Black.) 503, 17 L. Ed. 134; *infra*, § 1708.

³ *Infra*, § 1926.

⁴ See West. Jurist 201 et seq.

⁵ 4 Fed. Stats. Ann., 1st ed., p. 467.

⁶ See *Spies v. Illinois*, 123 U. S. 131, 31 L. Ed. 80, 8 Sup. Ct. 22; *Coy, In re*, 127 U. S. 731, 32 L. Ed. 274, 8 Sup. Ct. 1263.

⁷ See Fed. Stats. Ann., 2d ed., vols. 4-6.

country, where there was a general verdict of guilty on an indictment containing several counts, some bad and some good, to pass judgment on the counts that were good, on the presumption that it was to them that the verdict of the jury attached, and upon the withdrawal by the prosecution of the bad counts.¹ On the same reasoning,

1 See cases cited *supra*, §§ 342, 1671, and as ruling point in text, see: ALA.—*Shaw v. State*, 18 Ala. 547; *Baker v. State*, 30 Ala. 521; *Montgomery v. State*, 40 Ala. 684; *Chappell v. State*, 52 Ala. 359; *Toney v. State*, 60 Ala. 97. ARK.—*Brown v. State*, 10 Ark. (5 Eng.) 607; *Howard v. State*, 34 Ark. 433. CONN.—*State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223. GA.—*Bulloch v. State*, 10 Ga. 47, 54 Am. Dec. 369; *Williams v. State*, 60 Ga. 88; *Jackson v. State*, 76 Ga. 551; *Sessions v. State*, 3 Ga. App. 15, 59 S. E. 197. ILL.—*Sahlinger v. People*, 102 Ill. 241; *Mayes v. People*, 106 Ill. 306, 46 Am. Rep. 698; *Duffy v. State*, 107 Ill. 113, 47 Am. Rep. 431. IND.—*Dantz v. State*, 87 Ind. 398; *Myers v. State*, 92 Ind. 390. IOWA.—*State v. Shelledy*, 8 Iowa 477. KY.—*Parker v. Com.*, 46 Ky. (8 B. Mon.) 30. ME.—*State v. Burk*, 38 Me. 374. MD.—*Gibson v. State*, 54 Md. 447. MASS.—*Com. v. Holmes*, 17 Mass. 339; *Com. v. Hawkins*, 69 Mass. (3 Gray) 463; *Com. v. Howe*, 80 Mass. (14 Gray) 26; *Edgerton v. Com.*, 87 Mass. (5 Allen) 514; *Com. v. Nickerson*, 87 Mass. (5 Allen) 519. MICH.—*People v. Dalrymple*, 55 Mich. 519, 22 N. W. 20. MO.—*State v. Jennings*, 18 Mo. 435; *State v. Testerman*, 68 Mo. 408; *State v. Blan*, 69 Mo. 317; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257,

330. N. H.—*Arlen v. State*, 18 N. H. 563. N. J.—*West v. State*, 22 N. J. L. (2 Zab.) 212; *Hunter v. State*, 40 N. J. L. (11 Vr.) 495. N. Y.—*People v. Curling*, 1 Johns. 320; *Kane v. People*, 3 Wend. 363; *Guenther v. People*, 24 N. Y. 100; *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460; *Baron v. People*, 1 Park. Cr. Rep. 246. N. C.—*State v. Speight*, 69 N. C. 72. OHIO.—*Buck v. State*, 1 Ohio St. 61; *Tabler v. State*, 34 Ohio St. 137; *Ridenour v. State*, 38 Ohio St. 292. PA.—*Com. v. McKisson*, 8 Serg. & R. 430; *Hazen v. Com.*, 23 Pa. St. 355; *Hutchinson v. Com.*, 82 Pa. St. 472. S. C.—*State v. Pace*, 9 Rich. L. 355. TENN.—*Brice v. State*, 2 Tenn. (2 Over.) 254; *Isham v. State*, 23 Tenn. (1 Sneed) 111. TEX.—*Boren v. State*, 23 Tex. App. 28, 4 S. W. 463. VT.—*State v. Davidson*, 12 Vt. 300; *State v. Bean*, 19 Vt. 530. VA.—*Murphy v. Com.*, 64 Va. (23 Gratt.) 960. WIS.—*State v. Kube*, 20 Wis. 217, 91 Am. Dec. 390. FED.—*United States v. Furlong*, 18 U. S. (5 Wheat.) 184, 5 L. Ed. 64; *United States v. Potter*, 6 McL. 186, Fed. Cas. No. 16078.

It has been ruled, however, that when the counts cover offenses as to which there are several punishments, a general verdict of guilty is bad.—*State v. Montague*, 2 McC. L. (S. C.) 257.

Neither count sufficient, rule is

where one of two counts was bad, and the defendant was found guilty, and sentenced generally, courts of error presumed that the trial court awarded sentence on the good count; and the sentence would be held not erroneous, if it was warranted by the law applicable to the offense charged in that count.² This practice has been shaken in England in a case of great professional interest, as well as of high political importance, where a judgment of the Court of Queen's Bench of Ireland, on an indictment containing some good counts and some bad, as to each of which there was a verdict of guilty, was reversed, because the judgment was entered generally on the verdict, instead of severally on the good counts.³ It will be noticed, however, that, in the opinion of the great majority of the judges, the judgment of the court below was sus-

of course, otherwise.—United States v. Kelsey, 42 Fed. 889.

In Virginia it has been said that the rule is not applicable in cases of penitentiary crimes, where the jury is to ascertain the term of imprisonment, since the evidence on the bad counts may aggravate the punishment imposed by the verdict.—Mowbray v. Com., 38 Va. (11 Leigh) 643.

Compare: Clere v. Com., 44 Va. (3 Gratt.) 615; Murphy v. Com., 64 Va. (23 Gratt.) 960; Richards v. Com., 81 Va. 110.

The English practice, down to O'Connell's Case, was to consider one count as sufficient after verdict for all necessary purposes.—Grant v. Astle, 1 Dougl. 730, 99 Eng. Repr. 465; Peake v. Oldham, 1 Cowp. 275, 98 Eng. Repr. 1083.

See, fully, supra, §§ 1642, 1669.

² ALA.—Rowland v. State, 55 Ala. 210. ILL.—Hiner v. People, 34 Ill. 297. IND.—Powers v. State, 87 Ind. 97. KY.—Parker v. Com.,

47 Ky. (8 B. Mon.) 30. MASS.—Jennings v. Com., 34 Mass. (17 Pick.) 80; Josselyn v. Com., 47 Mass. (6 Metc.) 236; though see Com. v. Carey, 103 Mass. 214. MISS.—Wash v. State, 22 Miss. (14 Smed. & M.) 126. N. Y.—People v. Davis, 45 Barb. 494; affirmed 36 N. Y. 77. N. C.—State v. Miller, 29 N. C. (7 Ired. L.) 275. PA.—Hartmann v. Com., 5 Pa. St. 60. S. C.—State v. Connolly, 3 Rich. L. 337. TENN.—Bennett v. State, 27 Tenn. (8 Humph.) 118; Rice v. State, 50 Tenn. (3 Heisk.) 215. FED.—United States v. Plumer, 3 Cliff. 28, Fed. Cas. No. 16056; United States v. Burroughs, 3 McL. 405, Fed. Cas. No. 15695.

A reversal, however, is necessary if the punishment is greater than the law awards to the good count.—State v. Bean, 21 Mo. 269; infra, §§ 1716, 1858.

³ R. v. O'Connell, 11 Cl. & F. 155, 8 Eng. Repr. 161; Pamphlet Report Arm. & T. See Lord Denman's Life, II, 172.

tained, and that in the House of Lords the reversal was carried by a bare majority—Lord Denman, C. J., Lord Cottenham, and Lord Campbell voting for reversal; Lord Lyndhurst and Lord Brougham for affirmance. Of course, a judgment on a bad count must be reversed on error; and when on error one count in several is held to be bad, it is illogical, when there is a lumping judgment, to say that the judgment in the court below went only on the counts that were good. But the logical difficulty is overcome by counter presumptions which it is the duty of a court of error to supply. Suppose a count for a felony is joined to a count for an attempt to commit the same felony, which latter count is defectively pleaded; and suppose there be a general judgment on the indictment and sentence for the felony; would not a court of error be bound to presume that the court below treated the count for the attempt as a nullity? Or suppose that the pleader, as is usually the case in complicated trials, states the same offense in several different ways; and suppose that after a verdict of guilty, either generally or on each count severally, the court below should say, "These counts are alternative; one of the bunch is good; the offense they describe is the same; we sentence the defendant generally on the offense as proved, and which one of these counts fits:"—ought not a court of error to hold that the judgment attaches to the good count, and, if the sentence is no more than the law prescribes for such a count, to sustain the judgment? Strictly logical such a conclusion may not be, yet, not only would the greatest practical inconveniences follow if it be not accepted, but presumptions such as those we state are within the notice of a court of error, and if applied would, in all proper cases, remove the logical difficulty. At all events, to apply such presumptions was the uniform English practice, until O'Connell's Case, and in the United States, with but few exceptions, the courts have united in sustaining general judgments on an indictment in which there are several

counts stating cognate offenses, irrespective of the question whether one of these counts is bad.⁴ On the other

⁴ In England, *O'Connell's Case* was in some measure followed in *Campbell v. R.*, 11 Ad. & E. N. S. (11 Q. B.) 799, 63 Eng. C. L. 799; *Gregory v. R.*, 15 Ad. & E. N. S. (15 Q. B.) 957, 69 Eng. C. L. 973.

In *Latham v. R.*, 9 Cox C. C. 516, 5 Best & S. 635, 117 Eng. C. L. 663, 33 L. J. M. C. 197, where the record omits to set forth the finding or judgment on the first count of an indictment, but gives the finding and judgment on the second count, each count, for the purpose of the verdict, is a distinct indictment, and that, as there was a good finding upon a good count, the defendant might be convicted upon it.

In *Roscoe's Cr. Ev.*, p. 222, it is said that the difficulty may now be frequently got over by the power conferred by the 11 and 12 Vict., ch. 78, § 5, which provides that "whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such Court of Error either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition." Under this statute, where the prisoner is convicted on good and bad counts, and judgment is entered generally on all or on a bad count, the court of error may arrest the judgment on the bad counts, and enter judg-

ment, or direct it to be entered, on the good ones.—*Holloway v. R.*, 2 Den. C. C. 287, 17 Ad. & E. N. S. (17 Q. B.) 319, 79 Eng. C. L. 316.

Form in which sentence was passed in *Gregory v. R.*, 15 Ad. & E. N. S. (15 Q. B.) 957, 96 Eng. C. L. 956, was said by Lord Denman to be that which the judges had adopted in order to avoid the objection raised in *O'Connell v. R.* And the best plan in making up the record will be to state a separate judgment for each count.—See *Gregory v. R.*, p. 973 of the report.

In *United States v. Plumer*, 3 Cliff. 28, Fed. Cas. No. 16056, Clifford, J., said: "Special attention is called to the case of *O'Connell v. Queen*, 11 Cl. & Fin. 155, 8 Eng. Repr. 1061, but it is impossible to adopt that rule, as a different rule prevailed in the courts of that country, prior to the decision, for nearly two centuries; and when our ancestors immigrated here, they brought that rule with them as part of the common law, which can not now be changed by the federal courts."—See *United States v. Jensen*, 15 Fed. 138.

The case of *Wood v. People*, 59 N. Y. 117, 2 Cow. Cr. Rep. 116, it was argued, does not conflict with this rule, inasmuch as in that case the several assignments of perjury charged distinct offenses, and the jury might have based their verdict of guilty on assignments insufficiently alleged, or unsustained by proof of the materiality of the matter falsely sworn to.

hand there are cases in which no such presumption can be made. Suppose that the bad count is for an offense substantially different from the good count. Suppose that evidence, calculated to influence the jury on the good count, but inadmissible under that count, was admitted under the bad count. In such case, after a general verdict of guilty, there should be a new trial, or after a judgment on such verdict, there should be a reversal; the reason for such action being that the result was reached by the introduction of a wrongful element.⁵

⁵ The distinction in the text is illustrated in *Phelps v. People*, 72 N. Y. 372. In this case, to adopt a summary of the opinion of Rapallo, J., exception was taken on the trial to the form of the first forty-eight counts of the indictment, on the ground that the false entry was not set out in words and figures in those counts. . . . The allegation in the first count is "a false entry in a book of accounts called a ledger, kept in the office of the treasurer of the State of New York, by which a demand in favor of the People of the State of New York against the Mechanics and Farmers' Bank of Albany was created for the sum of \$200,000." In the succeeding forty-seven counts the language is varied so as to include the several terms used in the statute, namely: demand, obligation, claim, right, interest, increased, affected, etc., and to vary the party intended to be defrauded, etc. These other counts set forth a copy of the false entry. "The counsel for the People claims that the counts objected to are good, being in the words of the statute upon which the indictment is founded, but whether this position be sound or

not he contends that the conviction being general on all the counts, which are based on the same offense, if there is any one good count it is sufficient to sustain the conviction. This proposition was regarded as settled law. There being evidence in support of the good counts, and the jury having convicted upon them, as well as upon those claimed to be defective, it is clear that it was quite immaterial that the court held these latter to be good, and admitted evidence to sustain them, and refused to direct an acquittal under them, as those rulings could not have varied the result, and even if erroneous are not ground of reversal.—*People v. Gonzales*, 35 N. Y. 100; *Real v. People*, 42 N. Y. 270."

In Ohio it has been held that the rule that a judgment on a verdict of guilty, on an indictment containing several counts, some of which are good and some bad, will be sustained, is not varied by the circumstance that a demurrer of the defendant to the bad counts was overruled, after which the defendant pleaded not guilty to the whole indictment, it not appearing from the record that the defend-

Whether the defendant can object to an imprisonment for less than the legal minimum is hereafter noticed.*

III. BILL OF EXCEPTIONS.

§ 1705. **AT COMMON LAW, BILL OF EXCEPTIONS CAN NOT BE TENDERED.** The practice concerning bills of exception, so far as it is settled by statute, does not fall within the compass of this work. So far as concerns criminal cases at common law, it has always been held in this country that bills of exception do not lie. In England, the same view was generally taken by the older authorities;¹ but now it seems to be the better opinion that they may be tendered in cases of misdemeanor.² Where, in a case of obtaining money by false pretenses, and for a conspiracy to defraud, a bill of exceptions was tendered to the admissibility of certain documents in evidence, Lord Campbell, C. J., said that it was the first time he had ever known a bill of exceptions in a criminal case; but after hearing arguments at chambers, he sealed the bill of exceptions, leaving the question whether it would lie to be argued in the Court of Error.³ It is, however, agreed, that if a

ant was prejudiced by the introduction of evidence under the bad counts, which was not competent under the good counts.—*Robbins v. State*, 8 Ohio St. 131.

Where a special verdict only applies to a portion of the counts, leaving others undisposed of, and sentence is awarded on the whole indictment, it seems the judgment will be reversed.—*Baron v. People*, 1 Park. Cr. Rep. (N. Y.) 246. But see, *supra*, § 1673.

To subsequent chapters the reader is referred for a discussion of the question of errors in sentences on indictments containing two or more counts.—*Infra*, §§ 1846, 1858.

* *Infra*, § 1858.

¹ *Sir Harry Vane's Case*, 1 Sid. 85, 1 Keble 384, 1 Lev. 68, Kelynge 15.

² *R. v. Nutt*, 1 Barnard 307, 94 Eng. Repr. 208; *R. v. Paget*, 1 Leon. 5, 74 Eng. Repr. 5; *R. v. Preston, Inhabitants of*, 2 Str. 1040, 93 Eng. Repr. 1019; *R. v. Higgins*, 1 Vent. 366, 86 Eng. Repr. 236; *R. v. Alleyne*, cited Archbold's C. P., 17th ed., 160.

³ *R. v. Alleyne*, cited Archbold's C. P., 17th ed., 160.

For form of a bill of exceptions, on an information in quo warranto, see 2 Gude's Crim. Prac. 2117.

challenge, whether to the array or to the polls, be overruled without demurrer, the ruling of the judge may be made the subject of a bill of exceptions.⁴ On the other hand, in treason and felony a bill of exceptions has never been allowed at common law.⁵ In most jurisdictions, bills of exception are now allowed by statute in criminal prosecutions, the practice being under the direction of the trial courts.⁶ The record and the bill of exceptions form the only evidence of the action of the trial court.⁷

In preparing the bill of exceptions, it is usually necessary, in criminal as well as in civil issues, to show that the objection taken to the action excepted to was made

⁴ Bac. Abr. Juries (E.) 12; Skin. 101; 2 Inst. 427.

⁵ St. Tr. f. 938; 2 Hawkins, ch. 46, § 1; Bac. Abr. Bill of Exceptions.

In *re Hayes and Rice*, 3 Jones & La Touche 568, a case of felony, Sir E. Sugden, Lord Chancellor of Ireland, 1846, refused a writ for a bill of exceptions, saying that, "having regard to the terms of the 13 Edw. I, and of the Irish Act 28 Geo. III, ch. 31, and the authorities, that a bill of exceptions can not be taken in a case like this, particularly (*Vane's Case*, 2 Harg. St. Tr. 450; and *R. v. M'Donnell*, 1 Hud. & Br. 439); and having regard to the circumstance that there is no authority in favor of the statute of Westminster applying to a criminal case like this, he was of opinion, on a review of all the circumstances, that the application should not be granted."—Archbold's Crim. Pl., 17th ed., 160.

In *Indiana* a bill of exceptions can not be attacked on affidavit.—*Beavers v. State*, 58 Ind. 530.

In *Pennsylvania*, the extent to which the Supreme Court may re-

view errors in certain criminal cases was limited, by the Act of November 6, 1856, to the decisions of the court below on the trial, on points of evidence or law, excepted to by the defendant, and noted and filed of record by the court.—*Fife v. Com.*, 29 Pa. St. 429.

—By Revised Acts of 1860, bills of exception are under specified conditions allowed, and may be taken to the charge of the court, as well as to admission or exclusion of evidence.—*Goersen v. Com.*, 99 Pa. St. 388.

The *Virginia* practice is detailed in *Reed v. Com.*, 63 Va. (22 Gratt.) 924.

⁶ *Infra*, § 1712. D. C.—*United States v. Bicksler*, 1 Mack. 341. FLA.—*Bush v. State*, 21 Fla. 761. ILL.—*Baker v. People*, 105 Ill. 452. MO.—*State v. Vincent*, 91 Mo. 662, 4 S. W. 430. PA.—*Haines v. Com.*, 99 Pa. St. 410; *Haines v. Com.*, 100 Pa. St. 317.

⁷ *Green v. State*, 59 Ind. 123; *State v. Wheeler*, 44 N. J. L. (15 Vr.) 88; *Fulmer v. Com.*, 97 Pa. St. 503.

clearly and reasonably before the action of the court complained of; that the objection was overruled; and that the court was called upon to note an exception at the time. When specific instructions are excepted to, they must be stated in the bill of exceptions; when a charge as a whole is excepted to as defective it must be given at large; when the exception is that the evidence does not sustain the verdict, the evidence must be given in full.⁸

In England, bills of exception are now, under the judiciary system, abolished, the remedy, in civil cases, being motion for a new trial and appeal; in criminal cases, in which alone writs of error now lie, the remedy being application to reserve the points in dispute.⁹

IV. IN WHOSE BEHALF A WRIT OF ERROR LIES.

§ 1706. AT COMMON LAW, ERROR DOES NOT LIE FOR PROSECUTION; OTHERWISE BY STATUTE. At common law, as accepted in most jurisdictions in this country, a writ of error can not be taken by the prosecution to review an adverse judgment on demurrer or other procedure before the trial court.¹ In most states this is now permitted by statute.²

⁸ Wood v. State, 68 Ga. 296; Clark v. State, 68 Ga. 784; Haines v. Com., 100 Pa. St. 317; Luttrell v. State, 14 Tex. App. 772.

⁹ See Archbold's Practice 121.

¹ FLA.—State v. Burns, 18 Fla. 185. GA.—State v. Jones, 7 Ga. 422. ILL.—People v. Dill, 2 Ill. (1 Scam.) 257; Martin v. People, 13 Ill. 341; People v. Glodo, 12 Ill. App. 348. KY.—Com. v. Sanford, 15 Ky. (5 Litt.) 289; Com. v. Cain, 77 Ky. (14 Bush) 525. MASS.—Com. v. Cummings, 57 Mass. (3 Cush.) 212, 50 Am. Dec. 732. MO.—State v. Copeland, 65 Mo. 497, reversing State v. Peck,

51 Mo. 111. N. Y.—People v. Corning, 2 N. Y. 9, 49 Am. Dec. 364, overruling several prior cases. N. C.—State v. Phillips, 66 N. C. 647; State v. West, 71 N. C. 263; State v. Powell, 86 N. C. 640. TENN.—State v. Solomon, 14 Tenn. (6 Yerg.) 360, 27 Am. Dec. 469. TEX.—State v. Daugherty, 5 Tex. 1. VA.—Com. v. Harrison, 4 Va. (2 Va. Cas.) 202. WIS.—State v. Kemp, 17 Wis. 669. FED.—United States v. Moore, 7 U. S. (3 Cranch.) 159, 2 L. Ed. 397.

Contra: State v. Buchanan, 5 Har. & J. (Md.) 317.

² ARK.—State v. Graham, 1 Ark. (1 Pike) 428; State v. Hicklin, 5

Ark. (5 Pike) 190. LA.—*State v. Taylor*, 34 La. Ann. 978. N. Y.—*People v. Nestle*, 19 N. Y. 583. TEX.—*State v. Manning*, 14 Tex. 402.

For exceptional cases, see *State v. Douglass*, 1 G. Greene (Iowa) 550; *Com. v. Anthony*, 59 Ky. (2 Metc.) 400; *State v. Ross*, 14 La. Ann. 364; *Com. v. Scott*, 51 Va. (10 Gratt.) 750.

Other cases are noticed *infra*, § 1723.

By the recent English practice writs of error are allowed in criminal cases.—*R. v. Chadwick*, 11 Ad. & E. N. S. (11 Q. B.) 205, 63 Eng. C. L. 204; *R. v. Mills*, 10 Cl. & F. 534, 8 Eng. Repr. 844; *O'Connell's Case*, 11 Cl. & F. 155, 8 Eng. Repr. 1061; *R. v. Houston*, 2 Cr. & Dix. 310.

In New York, under the statute, the prosecution has been held not entitled to a writ of error to review the order of the Supreme Court, granting a new trial in a criminal case, where there had been a conviction and certiorari with stay of judgment in the court below.—*People v. Nestle*, 19 N. Y. 583.

It was at one time held that the writ only lies where there has been final judgment for the prisoner upon the indictment.—*People v. Nestle*, 19 N. Y. 583. See, *infra*, §§ 1869, 1870; *supra*, § 1330.

For errors in charge, see, *supra*, § 1647.

In *People v. Bork*, 78 N. Y. 346, it appeared that after conviction of defendant for embezzlement at the Oyer and Terminer, a case with exceptions was settled, a motion for a new trial thereon de-

nied, and a motion to quash the indictment made, entertained by the court, and denied. Sentence was suspended, and there was no judgment in the Oyer and Terminer. Thereafter a writ of certiorari was issued and allowed and the proceedings removed to the Supreme Court. After hearing both parties the General Term made an order that "the conviction be reversed," and subsequently at another general term, upon motion of the district attorney, the first order was modified by striking out the words therein, "proceedings remitted to the Erie Oyer and Terminer," and inserting, "the defendant discharged." It was ruled that the district attorney could not have the proceedings reviewed by the Court of Appeals upon writ of error.

At common law such writ lies only to review a final judgment (*Hartung v. People*, 26 N. Y. 154), nor then in behalf of the people (*People v. Corning*, 2 N. Y. 9, 49 Am. Dec. 364; *People v. Merrill*, 14 N. Y. 74); and a writ by the people in such a case as this is not allowed by any statute. See *People v. Clark*, 7 N. Y. (3 Seld.) 385.

In Pennsylvania, a writ of error was sustained when taken by the Commonwealth to a judgment for the defendant, on a demurrer to the evidence, and the Supreme Court directed the record to be remitted to the court below so that the latter might give judgment in accordance with the former's decree. This case, however, it should be observed, was one of fornication and bastardy, which may be treated as quasi civil.—*Com. v. Parr*, 5 Watts & S. (Pa.) 345.

§ 1707. AT COMMON LAW, FOR DEFENDANT A SPECIAL ALLOCATUR IS USUALLY NECESSARY. In England, no writ of error issues at common law for the defendant as a matter of right. To this the allowance of the attorney-general is necessary; though in this respect he has been accustomed to take the opinion of the appellate court as to the propriety of issuing the writ.¹

The same practice exists at common law in most of the United States;² with the exception that generally a writ may be allowed on the special allocatur of a single judge.³ Such was the rule in Pennsylvania at common law, and under the old practice the court refused to allow a writ to correct merely technical errors.⁴

A refusal to grant an allocatur does not bar a subsequent application for an allocatur to issue.⁵

In Maryland and Missouri, it would seem that a writ can issue without a special allocatur.⁶

One of several defendants convicted may bring a writ of error alone.⁷

The practice as to revision in the federal courts has been already considered.⁸

§ 1708. FUGITIVE CAN NOT BE HEARD ON SUCH WRIT. A writ of error will not be heard when the party suing it out has escaped from the jurisdiction of the court.¹

¹ Chitty Cr. Law 749.

² Loftin v. State, 19 Miss. (11 Smed. & M.) 358; Lavett v. People, 7 Cow. (N. Y.) 339; Com. v. Proffit, 4 Blinn. (Pa.) 424; Baker v. Com., 4 Va. (2 Va. Cas.) 353.

³ Compare: Webster v. Com., 59 Mass. (5 Cush.) 386, 394; Farris v. State, 1 Ohio St. 188.

⁴ Com. v. Martin, 2 Pa. St. 244.

For statutory practice in Pennsylvania, see Brightly's Troubat & Haly's Pr., §§ 886-888; Huntzinger v. Com., 97 Pa. St. 336.

⁵ Huntzinger v. Com., 97 Pa. St. 336.

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⁶ State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; Mitchell v. State, 3 Mo. 283, 25 Am. Dec. 442.

⁷ Wright v. R., 14 Ad. & E. N. S. (14 Q. B.) 148, 68 Eng. C. L. 147.

⁸ Supra, § 1703.

¹ ALA.—Warwick v. State, 73 Ala. 489, 9 Am. Rep. 59, overruling Parsons v. State, 22 Ala. 50. CAL.—People v. Redinger, 55 Cal. 280, 9 Am. Rep. 32. FLA.—Woodson v. State, 19 Fla. 549. GA.—Madden v. State, 70 Ga. 383; Gentry v. State, 91 Ga. 669, 17 S. E. 956. ILL.—McGowan v. People, 104 Ill.

V. AT WHAT TIME.

§ 1709. ERROR DOES NOT LIE TILL AFTER JUDGMENT. Error can only be taken after final judgment has been entered in the court trying the case.¹ On the importance of

100, 44 Am. Rep. 87. IND.—Sargent v. State, 96 Ind. 63. KAN.—State v. Scott, 70 Kan. 692, 3 Ann. Cas. 511, 79 Pac. 126. LA.—State v. Williams, 32 La. Ann. 235; State v. Wilson, 36 La. Ann. 863. ME.—Anonymous, 31 Me. 592. MASS.—Com. v. Andrews, 97 Mass. 544. MONT.—State v. Dempsey, 26 Mont. 504, 68 Pac. 1114. N. Y.—People v. Genet, 59 N. Y. 80, 17 Am. Rep. 315, 2 Cow. Cr. Rep. 157. OKLA.—Tyler v. State, 3 Okla. Cr. 179, 26 L. R. A. (N. S.) 921, 104 Pac. 919. TEX.—Brown v. State, 5 Tex. App. 126, 546; Loyd v. State, 19 Tex. App. 137. VA.—Sherman v. Com., 55 Va. (14 Gratt.) 677; Leftwich's Case, 61 Va. (20 Gratt.) 723. WASH.—State v. Handy, 27 Wash. 469, 67 Pac. 1094. W. VA.—State v. Connors, 20 W. Va. 1; State v. Sites, 20 W. Va. 13. FED.—Smith v. United States, 94 U. S. 97, 24 L. Ed. 32; Bonahan v. Nebraska, 125 U. S. 692, 31 L. Ed. 854, 8 Sup. Ct. 1390; Allen v. Georgia, 166 U. S. 138, 41 L. Ed. 949, 17 Sup. Ct. Rep. 525. ENG.—R. v. Cauldwell, 17 Ad. & E. N. S. (17 Q. B.) 503, 79 Eng. C. L. 503.

See, also, 9 Crim. Law Mag. 439, and notes, 19 Am. Rep. 76; 36 Am. Rep. 274; 22 Am. St. Rep. 920; 26 L. R. A. (N. S.) 923.

Escape of party indicted, court will suspend further proceedings until his recapture.—State v. McMillan, 94 N. C. 945.

Escape of prisoner convicted and he not in custody on day set

for hearing of writ of error, writ will be dismissed.—Warwick v. State, 73 Ala. 486, 9 Am. Rep. 59; People v. Redinger, 55 Cal. 290, 36 Am. Rep. 32; Gentry v. State, 91 Ga. 669, 17 S. E. 956; State v. Dempsey, 26 Mont. 504, 68 Pac. 1114; State v. Handy, 27 Wash. 469, 67 Pac. 1094; State v. Connors, 20 W. Va. 1; Allen v. State, 166 U. S. 138, 41 L. Ed. 949, 17 Sup. Ct. Rep. 525.

—Discretion of court to dismiss or continue until recapture, or even to proceed with the hearing.—State v. Jacobs, 107 N. C. 772, 32 Am. St. Rep. 912, 11 S. E. 962; State v. Keebler, 145 N. C. 560, 13 Ann. Cas. 496, 59 S. E. 872; Tyler v. State, 3 Okla. Cr. 179, 26 L. R. A. (N. S.) 921, 104 Pac. 919.

—Dismissal by state court of writ of error because accused had escaped from justice, is not a denial of due process of law within the meaning of the federal constitution.—Allen v. Georgia, 166 U. S. 138, 41 L. Ed. 949, 17 Sup. Ct. Rep. 525.

Trial court may refuse to sign bill of exceptions where prisoner escapes after conviction.—State v. Logan, 125 Mo. 22, 28 S. W. 176.

As to mandamus to compel settling and sealing bill of exceptions where prisoner has escaped, see note, 68 Am. Dec. 226.

As to right to appeal while a fugitive from justice, see note, 41 Am. Dec. 272.

¹ MD.—Neff v. State, 57 Md. 385. N. Y.—People v. Merrill, 14 N. Y.

adhering positively to this rule it is scarcely necessary to enlarge. It is essential to the just administration of penal law. But it is not necessary, in case of judgment on demurrer, that sentence should be pronounced.²

§ 1710. FAILURE TO DEMUR, ETC., DOES NOT WAIVE RIGHT. After final judgment the right is one which it is equally necessary to maintain intact. And in accordance with this view, failure to demur, or move in arrest of judgment, can not be held to waive the right to make objections to the indictment in the appellate court; the right being constitutional and not personal.¹

VI. FOR WHAT ERRORS.

1. *At Common Law.*

§ 1711. AT COMMON LAW, ERROR ONLY LIES TO MATTER OF RECORD. At common law, as has been already noticed, error lies only to matters of record.¹ Of the errors of

75; *People v. Nestle*, 19 N. Y. 583; *Tabor v. People*, 90 N. Y. 248, affirming 25 Hun 638. NEB.—*Green v. State*, 10 Neb. 102, 4 N. W. 422. OHIO—*Kinsley v. State*, 3 Ohio St. 508; *Cochrane v. State*, 30 Ohio St. 61. PA.—*Miles v. Rem*, 4 Yeates 319; *Grant v. Com.*, 71 Pa. St. 495; *Staup v. Com.*, 74 Pa. St. 458; *Com. v. Ruth*, 104 Pa. St. 294. TEX.—*Mirelles v. State*, 13 Tex. App. 346. FED.—*United States v. Norton*, 91 U. S. 566, 23 L. Ed. 454. ENG.—*R. v. Kenworthy*, 1 Barn. & C. 711, 8 Eng. C. L. 300, 3 Dow. & Ry. 173.

Error does not lie to an interlocutory decision as to sanity.—*Inskeep v. State*, 35 Ohio St. 482.

² *Com. v. McCormick*, 126 Mass. 258.

¹ *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293.

As to consent in curing irregularities, see, *supra*, § 1668; and on general question, see 1 Kerr's Whart. Crim. Law, §§ 184-187.

¹ COLO.—*Smith v. People*, 1 Colo. 121. LA.—*State v. Branch*, 25 La. Ann. 115. MD.—*Davis v. State*, 39 Md. 355. MASS.—*Turns v. Com.*, 47 Mass. (6 Metc.) 224. N. Y.—*People v. Casey*, 72 N. Y. 393; *Gaffney v. People*, 50 N. Y. 416, 1 Cow. Cr. Rep. 526. N. C.—*State v. Lawrence*, 81 N. C. 522. PA.—*Sampson v. Com.*, 5 Watts & S. 385; *McCue v. Com.*, 78 Pa. St. 185, 21 Am. Rep. 7. VA.—*Campbell v. Com.*, 4 Va. (2 Va. Cas.) 314. FED.—*Brand v. United States*, 18 Blatchf. 384, 4 Fed. 394. ENG.—*Nash v. R.*, 9 Cox C. C. 424.

As to effect of failure of record to show prisoner was asked whether he had anything to say

record which may thus be reviewed at common law, the following are given as illustrations in the 17th edition (1871) of Archbold's Criminal Pleading: "If in an indictment for perjury on which judgment has been given, it does not appear that the oath upon which the perjury has been assigned has been taken in a judicial proceeding;² or that the court had competent authority to administer the oath;³ or that the defendant swore 'falsely';⁴ a writ of error may be brought. So if an indictment be preferred for libellous words and they are not indictable,⁵ and judgment be given thereon. And an indictment charging the defendant with obtaining money by false pretenses, without showing what the pretenses were, is insufficient, and such a defect would be ground for reversing the judgment;⁶ so before it was unnecessary for indictments for false pretenses to allege any ownership of the money or goods obtained, if such an indictment did not show whose were the money or goods obtained by means of the false pretenses.⁷ If in an indictment for burglary it appeared that the prisoner broke and entered the dwelling-house with intent to commit a trespass or misdemeanor, and not a felony, error would lie.⁸ So where value is of the essence of the offense, as in embezzlement, to the value of £10 or upwards by bankrupts (24 and 25 Vict., ch. 134, sec. 221), the omission of a statement of the value would render the indictment bad on error. In the

why judgment should not be pronounced against him in a felony case, see, *infra*, § 1845.

Evidence can come up by bill of exceptions, only. — Knight, *Ex parte*, 61 Ala. 482; Allen v. State, 46 Wis. 383, 1 N. W. 121.

² R. v. Overton, 4 Ad. & E. N. S. (4 Q. B.) 83, 90, 45 Eng. C. L. 83, 12 L. J. (M. C.) 61.

³ R. v. Hallett, 2 Den. 237, 20 L. J. (M. C.) 197; R. v. Chapman, 1 Den. 432, 18 L. J. (M. C.) 152;

Lavey v. R., 2 Den. 504, 17 Ad. & E. N. S. (17 Q. B.) 496, 79 Eng. C. L. 495, 21 L. J. (M. C.) 10.

⁴ R. v. Oxley, 3 Car. & K. 317.

⁵ As in R. v. Penny, 1 Ld. Raym. 153, 91 Eng. Repr. 999.

⁶ R. v. Mason, 2 T. R. 581, 100 Eng. Repr. 312; Holloway v. R., 2 Den. 296.

⁷ Sill v. R., Dears. 132, 1 E. & B. 553, 22 L. J. (M. C.) 41.

⁸ R. v. Powell, 2 Den. 403.

same way, where local description is necessary, its omission would be fatal.⁹ So, also, where time is of the essence of the offense, as in burglary. An indictment charging a conspiracy to cheat and defraud certain tradesmen of divers quantities of their goods and chattels was held insufficient, on error, for not setting out the names or designating the class of persons intended to be defrauded.¹⁰ Where the defendant challenges a juror peremptorily, and the crown demurs, and judgment is wrongly given by the court in which the trial is proceeding against the defendant's right to a peremptory challenge, a court of error will reverse the whole proceedings.¹¹ But *semble*, there must be a regular judgment on an issue joined in law or in fact to found the writ of error on, and the mere order by the court that the juror challenged by the crown shall stand by, though irregular, is not ground of error.¹² So, also, where a challenge to the array is improperly overruled, it is error.¹³ If the verdict of the jury were returned during the absence of one of the jurors, it would be error. So, also, where it does not appear upon the record that the jurors were *boni et legales homines*. But where the record set out an award of venire to the sheriff which required him to impanel and return a jury of good and lawful men of the county, and then proceeded to state that the sheriff, for the purpose aforesaid, impaneled and returned certain persons named, and arrayed them in one panel; it was held that by reasonable intendment the record showed that the persons

⁹ See 14 & 15 Vict., ch. 100, § 23; as in nuisance to highways (4 Chitty's Crim. L. 423), keeping disorderly houses, arson, burglary, housebreaking, stealing in a dwelling-house, being armed at night on land for the purpose of killing game, etc.

¹⁰ King v. R., 7 Ad. & E. N. S. (7 Q. B.) 798, 53 Eng. C. L. 795, 14 L. J. (M. C.) 172; cited at large

in 2 Kerr's Whart. Crim. Law, § 1613; and see Lord Hale's Com. F. N. B., tit. Error.

¹¹ Gray v. R., 11 Cla. & Fin. 427, 8 Eng. Repr. 1164.

¹² Ibid.; Mansell v. R., 8 El. & Bl. 54, 92 Eng. C. L. 52, Dears. & B. 375, 27 L. J. (M. C.) 4.

¹³ O'Connell v. R., 11 Cla. & Fin. 155, 8 Eng. Repr. 1061.

See, also, *supra*, §§ 1628-1630.

named in the panel were good and lawful men of the county.¹⁴ Error may also be assigned on a special verdict, where judgment has been passed on the defendant;¹⁵ and on the omission of the allocatur, or demand of the defendant what he has to say why judgment should not proceed against him. So, also, if sentence of death be passed against a prisoner not present in court.¹⁶ If an indictment be preferred at the quarter sessions for an offense not cognizable by justices of the peace, and the defendant be convicted and judgment passed upon him, the proceedings will be reversed on error: such as an indictment on a penal statute, where jurisdiction is not given to sessions;¹⁷ or an indictment for perjury, which would be wholly void;¹⁸ or for forgery;¹⁹ or an indictment for conspiracy, not within the exceptions of 5 and 6 Vict., ch. 38, sec. 1. A writ of error also lies to reverse an outlawry.²⁰ Duplicity in pleading is not ground of error,²¹ but it is otherwise with the omission of any essential averment.²² "If the judge, in the exercise of his discretion, discharge the jury on the ground of necessity, such exercise of his discretion can not be reviewed in a court of error."²³ No writ of error lies on a summary con-

¹⁴ *Mansell v. R.*, 8 El. & Bl. 54, 92 Eng. C. L. 52, Dears. & B. 375, 27 L. J. (M. C.) 4.

¹⁵ *R. v. Elwell*, 2 Ld. Raym. 1514, 92 Eng. Repr. 482; *R. v. Chadwick*, 11 Ad. & E. N. S. (11 Q. B.) 205, 63 Eng. C. L. 204, 17 L. J. (M. C.) 33; see, *supra*, § 1678.

¹⁶ 1 Ld. Raym. 48, 267. See, *infra*, § 1845.

Defendant must be present at all the proceedings. See, *supra*, § 1475.

¹⁷ 4 Mod. 379; 3 Salk. 188.

¹⁸ *R. v. Haynes*, 1 Ry. & M. 298, 21 Eng. C. L. 756.

¹⁹ *R. v. Rigby*, 8 Car. & P. 770, 34 Eng. C. L. 1012.

²⁰ *R. v. Wilkes*, 4 Burr. 2527, 2537, 98 Eng. Repr. 327, 332, 2 Hawk., ch. 50, § 11; Hand's Cr. Prac. 487, n.

²¹ *Nash v. R.*, 9 Cox C. C. 444; 4 Best & S. 935, 116 Eng. C. L. 935. *Supra*, § 305.

²² *Robinson v. Com.*, 101 Mass. 27; *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293; *R. v. Cook*, 1 R. & R. 176.

History of practice as to bills of exception is elaborately considered in *Raymond on Bills of Except.*—*State v. Clifford*, 58 Wis. 113, 16 N. W. 25, 4 Cr. L. Mag. 704.

²³ *Winsor v. R.*, L. R. 1 Q. B. Div. 289; *ibid.* 390 (Exch. Cham.).

viction;²⁴ it only lies on judgments in courts of record acting according to the course of common law."²⁵ Refusing a motion to quash is no ground for error.²⁶ Nor does error lie for matters subsequent to final judgment.²⁷

A certiorari lies to bring up points of record which are required in the appellate court.²⁸ Errors in reference to grand jury have been already considered.²⁹

2. *By Statute.*

§ 1712. BY STATUTE, EXCEPTIONS MAY BE TAKEN FOR WHICH ERROR LIES. By statutes of comparatively recent adoption, exceptions may be taken to the rulings of the court at trial, and these exceptions removed by writ of error to the appellate court.¹ Where such a practice is established to the extent of putting criminal cases on the same basis with civil, all matters which are thus excepted to below may be the subject of revision in the court above. But, unless duly excepted to, errors will not be so noticed.²

§ 1713. ERROR DOES NOT USUALLY LIE TO MATTERS OF DISCRETION. There is, however, this distinction to be kept in mind. There are some questions, such as those relating to continuance,¹ to severance on trial, to election,² to the order of procedure in examination of witnesses,³ to the speeches of counsel,⁴ to the management of the jury which

²⁴ Per Holt, C. J., *Groenvelt v. Burwell*, 1 Ld. Raym. 469, 91 Eng. Repr. 1212.

²⁵ Jerv. Archbold, 17th ed. (1871), p. 187; Com. Dig. Pleader, 3 B. 7.

²⁶ Supra, § 1314.

²⁷ *Elghmy v. People*, 78 N. Y. 330.

²⁸ *Graves v. State*, 45 N. J. L. (16 Vr.) 379, 46 Am. Rep. 782.

²⁹ Supra, § 1280.

¹ *Stokes v. People*, 53 N. Y. 164,

13 Am. Rep. 492; *Wiggins v. People*, 93 U. S. 465, 23 L. Ed. 941.

As to exceptions to charge of court, see, supra, §§ 1730 et seq.

² Supra, § 1657; *Joan v. Com.*, 136 Mass. 162.

¹ Supra, § 1536; *Shebane v. State*, 13 Tex. App. 533.

² Supra, § 345.

³ *Com. v. Blair*, 126 Mass. 40; *Arnold v. People*, 75 N. Y. 613; *Dubose v. State*, 13 Tex. App. 418.

⁴ Supra, § 1495.

eminently belongs to the discretion of the judge trying the case,⁵ and which in many jurisdictions can only, except in extreme cases of injustice, be revised by the judge himself, or by a court of which he is a member.⁶ The same rule applies at common law to the action of the court below in refusing a new trial,⁷ though it is otherwise in some jurisdictions by statute.⁸ The law in this respect is specifically noticed in the chapters in which these particular topics are discussed.⁹ And error does not lie for rudeness of manner to a defendant by a trial judge, unless it is capable of being put on record and results in injury

⁵ *State v. Wart*, 51 Iowa 587, 2 N. W. 405.

⁶ See *Tarbox v. State*, 38 Ohio St. 581, where this was extended to the decision of the trial court on questions of immaterial variance. *Infra*, § 1741.

⁷ *Infra*, §§ 1752, 1843. CONN.—*Lester v. State*, 11 Conn. 897. MICH.—*People v. Francis*, 52 Mich. 575, 18 N. W. 364. MO.—*State v. Lowe*, 63 Mo. 541. N. Y.—*Donohue v. People*, 56 N. Y. 208; *King v. People*, 5 Hun 297. PA.—*McManus v. Com.*, 91 Pa. St. 57. VA.—*Bull's Case*, 55 Va. (14 Gratt.) 613; *Read v. Com.*, 63 Va. (22 Gratt.) 924.

⁸ *Infra*, § 1843; *Ridenour v. State*, 38 Ohio St. 272.

⁹ Discretion is thus defined in an able opinion delivered in Ohio: "In the conduct of a trial, very many matters must rest in the discretion of the court of original jurisdiction. If the matter complained of infringes upon no rule of law, and merely affects the mode and manner of arriving at a determination, and not the right or merits to be decided, it is generally considered a matter of practice within the discretion of the court, with which it would not be

proper for a court in error to interfere. Upon a motion for a new trial, and upon a review of the action upon that motion of the court in which the case was tried, which we permit by bill of exceptions and on proceeding in error, the range of action in reference to such matters is undoubtedly enlarged. But in such a case we suppose that it must appear that there has been an abuse of discretion, resulting in injustice. A difference of opinion as to the proper course of proceeding would not be sufficient; the appellate court must be able to say that the course pursued was not only improper, but that it operated unjustly and injuriously to the parties."—*Gandolfo v. State*, 11 Ohio St. 114; cited and adopted in *Powell* on App. Jur. 321.

To the same effect, see *People v. Cole*, 43 N. Y. 508, 1 Cow. Cr. Rep. 295; cited, *supra*, § 1502.

For discretion as to order of addresses by counsel and examining witness, see, *supra*, §§ 1945 et seq.

As to continuances, §§ 1577 et seq.

As to charge of court, § 1643.

to the defendant.¹⁰ Nor does error lie for admission of evidence to which no exception was taken at the admission.¹¹

§ 1714. ACTION OF TRIAL COURT PRESUMED TO BE REGULAR. As is shown fully in accompanying volume,¹ the doctrine that in error regularity is presumed in judicial procedure applies to the criminal as well as to the civil side of the law. Thus when the record shows impaneling and swearing it will be presumed in error that the swearing was in conformity with law,² and the impaneling was regular.³ But this presumption does not apply to material and incurable defects.⁴

§ 1715. FOR ERRORS OF FACT, ERROR CORAM NOBIS LIES. For an error of fact, a writ of error coram nobis may be maintained.¹ In this way it has been held in Indiana that a court can take cognizance of and reverse a judgment

As to bail, *supra* § 117.

As to joinder of defendants,
§§ 355, 1688.

As to new trial, *infra*, § 1843.

As to challenges, *supra*, § 1628.

Commitment for perjury during trial of a witness for the defendant is not ground for a reversal on error, however operative it might be in obtaining a new trial. —Lindsay v. People, 63 N. Y. 145, 2 Cow. Cr. Rep. 242.

¹⁰ Arnold v. State, 75 N. Y. 603.

¹¹ Gallaher v. State, 17 Fla. 370.

Generally error does not lie for mistakes by which the party appellant was not injured. *Infra*, § 1858; Swann v. State, 64 Md. 424, 1 Atl. 872; McHugh v. State, 42 Ohio St. 154.

¹ 2 Whart. Crim. Ev. (Hilton's ed.), § 828, and cases there cited; Green v. State, 66 Ala. 40, 41 Am. Rep. 744; Garlington v. State, 68

Ga. 837; State v. English, 34 Kan. 629, 9 Pac. 761; People v. Osterhaut, 34 Hun (N. Y.) 261.

² Potsdamer v. State, 17 Fla. 895.

³ Rash v. State, 61 Ala. 89.

⁴ Perdue v. Com., 96 Pa. St. 311.

¹ 7 Robins. Pr. 149; Stephen's Pl. 118; Tidd's Prac. 1136; Coofey, note to Blackst., tit. "Error." ARK.—Adler v. State, 35 Ark. 517, 37 Am. Rep. 48; Howard v. State, 58 Ark. 299, 24 S. W. 8. MO.—Taney, Ex parte, 11 Mo. 661; Gray, Ex parte, 74 Mo. 160; Cross v. Gould, 131 Mo. App. 585, 110 S. W. 672. FED.—United States v. Plumer, 3 Cliff. 1, Fed. Cas. No. 16055. ENG.—O'Connell v. R., 11 Cl. & F. 155, 8 Eng. Repr. 1061; Evans v. Roberts, 3 Salk. 147, 91 Eng. Repr. 743.

See, also, notes, 97 Am. St. Rep. 364; 18 L. R. A. 840; 19 L. R. A. 762.

entered on a plea of guilty extorted from the defendant by duress and intimidation.²

VII. ERROR IN SENTENCE.

§ 1716. APPELLATE COURT REVERSING FOR ERROR IN SENTENCE, AT COMMON LAW, MUST DISCHARGE. In England,¹ and in some portions of the United States,² it has been held that at common law a court in error, when it reverses on account of error in the sentence, must discharge the defendant, for it can not remit the case, or impose a new sentence itself. But, as will hereafter be more fully explained,³ this proposition has been by no means universally received; and even at common law it has been argued, with strong reason, that where an appellate court is authorized to review, it is authorized to correct. In many states it is expressly provided by statute that when there is an error in the sentence requiring reversal, the appellate court is to render such judgment as the court below should have rendered,⁴ or to remand the record to

² *Saunders v. State*, 81 Ind. 318 (supra, § 414), where an able opinion by Elliott, J., sustains the position in the text. See, also, note to the same in 4 Crim. Law Mag. 372, where the practice is discussed in detail.

¹ 1 Chitty Cr. L. 755; *R. v. Bourne*, 7 Ad. & El. 58, 34 Eng. C. L. 55; *R. v. Silversides*, 2 G. & D. 617, 3 Ad. & E. N. S. (3 Q. B.) 406, 43 Eng. C. L. 794; *R. v. Ellis*, 5 Barn. & C. 395, 11 Eng. C. L. 512; *Holt v. R.*, 2 D. & L. 774; *Holland v. R.*, 2 Jebb. & S. 358.

² *McDonald v. State*, 45 Md. 90; *Christian v. Com.*, 46 Mass. (5 Metc.) 530; *Ratsky v. People*, 29 N. Y. 124; *Howell v. State*, 1 Ore. 241.

Contra: *Kelly v. State*, 11 Miss. (3 Smed. & M.) 518.

In Lange, Ex parte, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872, the Supreme Court of the United States assumed the jurisdiction of discharging in such cases on habeas corpus. But see, *infra*, § 1943.

³ *Infra*, § 1869.

⁴ See *Powell on Appellate Juris.* 341; *Messner v. People*, 45 N. Y. 1; *Graham v. People*, 63 Barb. (N. Y.) 468.

As to English practice, see *R. v. Bourne*, 7 Ad. & El. 58, 34 Eng. C. L. 55; *Holloway v. R.*, 2 Den. 287, 17 Ad. & E. N. S. (17 Q. B.) 317, 79 Eng. C. L. 316; *R. v. Drury*, 3 Car. & K. 193; *Archbold's C. P.*, 17th ed., 195.

For statutes correcting common law in this respect, see *Jacquins v. Com.*, 63 Mass. (9 Cush.) 279;

the court below for an amended sentence.⁵ The whole of a sentence may be reversed for an error in part,⁶ or a sentence, if divisible, may be affirmed in part and reversed in part.⁷ But where the case is one on which no conviction could, on any contingencies, be sustained, the appellate court will reverse absolutely, and order the defendant to be discharged.⁸

Whether a sentence will be reversed because one count is bad has been already discussed.⁹

VIII. ASSIGNMENT OF ERRORS.

§ 1717. ERROR MUST BE ASSIGNED. "The writ having been duly returned, the next proceeding is the assignment of errors. On a charge of felony, the party suing out the writ must appear in person to assign errors;¹ and it is said² that if the party be in custody, in the prison of the county or city in which the trial has taken place, he

Ratsky v. People, 29 N. Y. 124;
Beale v. Com., 25 Pa. St. 11.

As to sentence for imprisonment, see, *infra*, § 1858.

For a reversal on ground of excessive sentence, see *State v. Driver*, 78 N. C. 423.

In Pennsylvania, a defective sentence may be remoulded, and the defendant sentenced *de novo*.—*Drew v. Com.*, 1 Whart. (Pa.) 279; *Daniels v. Com.*, 7 Pa. St. 371.

But the more recent practice is to remand to the court below.—*Beale v. Com.*, 25 Pa. St. 11.

⁵ *Infra*, § 1870; *De Bardelaben v. State*, 50 Ala. 179; *Dodge v. People*, 4 Neb. 220; *Harris v. People*, 59 N. Y. 599. See *McCue v. Com.*, 78 Pa. St. 185, 21 Am. Rep. 7.

⁶ *Picket v. State*, 22 Ohio St. 405.

⁷ *Christian v. Com.*, 46 Mass. (5 Metc.) 530; *People v. Phillips*, 42

N. Y. 200; *Montgomery v. State*, 7 Ohio St. 107.

See, also, *infra*, §§ 1858, 1869; *supra*, § 1685.

The record itself is not sent up to the Superior Court in proceedings in error, but only a transcript; and for the purposes of amendment, the record remains in the court below.—*Graham v. People*, 63 Barb. (N. Y.) 468. See *Cancemi v. People*, 18 N. Y. 128.

As to making up record, see *Earl v. People*, 73 Ill. 329; *Fillian v. State*, 5 Neb. 351; *State v. Coleman*, 27 La. Ann. 691; *Bolen v. State*, 26 Ohio St. 371; *Bartlett v. State*, 28 Ohio St. 669.

⁸ *Miller v. People*, 90 Ill. 409.

⁹ *Supra*, § 1704.

¹ 8 Rep. Crim. L. 173.

² *Corner's Cr. Prac.* 102.

As to where error may be returnable, see *Hazen v. Com.*, 23 Pa. St. 355.

must be brought up by habeas corpus for the purpose of this formality, which writ must be moved for on affidavit.³ So, where a person convicted of felony brings error from the Queen's Bench into the Exchequer Chamber, the general rules for governing the proceedings in error in civil cases under the Reg. Gen. Hil. T. 2 W. 4, and under the Common Law Procedure Act, do not apply; but the prisoner must be brought to the Court of Exchequer Chamber, and must there pray oyer of the record, and assign errors by delivering them in writing to the officer of that court, and must be present during the argument and the delivery of the judgment." To enable errors not of record to be acted on by the appellate court, they must not only be excepted to at the time of occurrence, but the exception must be sealed and the error duly and specially assigned.⁴

IX. JOINDER IN ERROR.

§ 1718. **MUST BE JOINDER IN ERROR.** According to the English practice, the attorney-general, on the delivery of the assignment of errors, may join in error, ore tenus.¹ If there be no joinder in error in some form by the prosecution, the plaintiff in error is entitled to judgment.²

³ See *Holloway v. R.*, 17 Ad. & E. N. S. (17 Q. B.) 317, 79 Eng. C. L. 316, 2 Den. 287; *Mansell v. R.*, 8 El. & B. 54, 92 Eng. C. L. 52; *Dears. & B.* 375; 27 L. J. (M. C.) 4.

⁴ FLA.—*Potsdamer v. State*, 17 Fla. 895. ILL.—*Knouff v. People*, 6 Ill. App. 154. ME.—*State v. Savage*, 69 Me. 112; *State v. Stoyell*, 70 Me. 560. N. Y.—*People v. Guidici*, 100 N. Y. 503, 3 N. Y. Cr. Rep. 551, 3 N. E. 493. TEX.—*Hemanus v. State*, 7 Tex. App. 372.

¹ *Jervis' Archbold*, 17th ed., 192; 19th ed., 211.

² In *R. v. Howes*, 7 Ad. & E. 60,

n., 34 Eng. C. L. 56, 3 N. & M. 462, 28 Eng. C. L. 614, "the crown not having joined in error, the court granted a peremptory rule (a previous rule having been made to the like effect) that judgment should be entered for the defendants, unless the coroner and attorney of the King's Bench should join in error within four days after notice of that rule, to be given to the prosecutor and the solicitor for the treasury; and the coroner not having joined in error, judgment was given for the defendants, and they were discharged." —*Archbold's C. P.*, 17th ed., 193.

X. SUPERSEDEAS.

§ 1719. AT COMMON LAW, A WRIT OF ERROR IS A SUPERSEDEAS IN CAPITAL CASES. At common law, a writ of error, though duly allowed by the appellate court, is not a supersedeas so as to discharge from custody;¹ but in capital cases it operates to stay execution.²

XI. REMOVAL TO FEDERAL COURTS.¹

§ 1720. SUCH REMOVAL PROVIDED FOR BY STATUTE. By the Revised Statutes of the United States provision is made for the removal to the Circuit Court of the United States of criminal prosecutions in which a party indicted is denied by local law his "equal civil rights," or in which the party indicted is a federal officer, and the act charged is alleged to have been done in obedience to federal authority.²

The right, however, when based on the fourteenth amendment to the Constitution, can not extend to individual infringements of the sanctions of that amendment. A removal to the federal courts can only be claimed when the alleged impediments to justice arise from state statute or regulation, which the applicant must show.³ Mere local prejudice against a person of color is not ground for removal.⁴ It is otherwise when a state statute works the deprivation of rights.⁵ And the right to remove is ruled

¹ R. v. Wilkes, 4 Burr. 2527, 98 Eng. Repr. 327.

² Brightly's Troub. & Haly's Pr. 885.

³ See Dillon on Removal of Causes from State to Federal Courts, 3d ed., 1884.

Removals now controlled by Federal Judiciary Act, §§ 28 et seq., 5 Fed. Stats. Ann., 2d ed., pp. 16 et seq.

⁴ See Rev. Stat. U. S., § 641, 24 Fed. Stats. Ann., 1st ed., p. 258, now Judiciary Act, § 31, 4 Fed.

Stats. Ann., 2d ed., p. 376; 1 Cr. Law Mag. 139.

⁵ Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567.

⁶ Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Texas v. Gaines, 2 Woods 342, Fed. Cas. No. 13847; Wells, In re, 3 Woods 128, 17 Alb. L. J. 111, Fed. Cas. No. 17386.

⁷ Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664, reversing State v. Strauder, 11 W. Va. 745, 27 Am. Rep. 606.

to exist in all cases in which the defendant is charged in a state court for a crime consisting in the performance of his duty as a federal officer.⁶

⁶ *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648, Clifford and Field, JJ., dissenting; *State v. Post*, 4 Woods 513, 3 Fed. 117. See *Mayor v. Cooper*, 73 U. S. (6 Wall.) 247, 18 L. Ed. 851; *Georgia v. O'Grady*, 3 Woods 496, Fed. Cas. No. 5352; *State v. Hoskins*, 77 N. C. 530; *Com. v. Ashmun*, 3 Grant (Pa.) 416, 436.

The removal, when the ground is prejudicial state legislation, can not, it is said, take place until indictment found.—*Georgia v. O'Grady*, 3 Woods 496, Fed. Cas. No. 5352.

Though, when the prosecution is against a federal officer for his official acts, the removal may be had when warrant issues and arrest is made.—*Georgia v. Port*, 4

Woods 513, 3 Fed. 117; *Georgia v. Bolton*, 11 Fed. 217.

Under U. S. Rev. Stat., § 639, a removal may be had after a new trial in state court.—*Dart v. McKinney*, 9 Blatchf. 359, Fed. Cas. No. 3583.

§ 639 was suspended. See 1 Fed. Stats. Ann., 1st ed., p. 257.

The matter now governed by the Federal Judiciary Act, § 34. See 5 Fed. Stats. Ann., 2d ed., p. 386.

Quashing a removal indictment restores state jurisdiction.—*Bush v. Kentucky*, 107 U. S. 110, 27 L. Ed. 354, 1 Sup. Ct. 625.

As to amendments of statute, see *Baltimore & O. R. Co. v. Bates*, 119 U. S. 464, 7 Sup. Ct. 285, 30 L. Ed. 436; Act of Aug. 13, 1888, 25 Stat. at Large 434.

CHAPTER XXVII.

NEW TRIAL.

I. IN WHAT NEW TRIALS CONSIST.

§ 1721. A new trial is a re-examination after verdict of facts and law not of record.

II. IN WHAT CASES COURTS HAVE AUTHORITY TO GRANT.

1. *After Acquittal.*

§ 1722. No new trial after acquittal.

§ 1723. — Otherwise when verdict was fraudulent.

§ 1724. — So in quasi civil cases.

§ 1725. Motion for new trial only applicable to counts where there has been a conviction.

§ 1726. Conviction of minor offense is acquittal of major.

2. *After Conviction.*

§ 1727. Generally new trial can be granted at discretion of court.

§ 1728. — In this country this applies to all classes of crimes.

III. FOR WHAT REASONS.

§ 1729. In general.

1. *Misdirection of Court.*

§ 1730. Any material misruling ground for new trial.

§ 1731. — And so as to mistaken ruling as to presumption of facts.

§ 1732. Omission to charge cumulatively is no error.

§ 1733. Judge not required to charge as to undisputed law, when no points are tendered.

§ 1734. Otherwise when jury fall into error from want of instruction.

§ 1735. Yet abstract dissertations by judge are not required.

§ 1736. Judge may give opinion as to weight of evidence.

§ 1737. Preadjudication by judge may be ground for new trial.

§ 1738. Judge may give supplementary charge, but not in absence of defendant.

§ 1739. Erroneous instruction on one count vitiates when there is a general verdict.

2. *Mistake as to Admission or Rejection of Evidence.*

§ 1740. Such error ground for new trial.

§ 1741. Usually court will not presume that illegal evidence had no effect.

§ 1742. When erroneous ruling is rescinded, no ground for a new trial.

§ 1743. Objection to avail, must have been made at time.

3. *Verdict Against Law.*

§ 1744. Jury bound to receive law from court.

§ 1745. — Earlier doctrine in this respect to the contrary.

§ 1746. — Early cases no longer authoritative.

§ 1747. — Practical illustration of doctrine.

§ 1748. — Practice repudiated.

§ 1749. Jury are, at common law, not judges of law.

§ 1750. Court bound to hear counsel as to law.

§ 1751. Court may direct acquittal or conviction.

4. *Verdict Against Evidence.*

§ 1752. Verdict against evidence may be set aside.

5. *Irregularity in Conduct of Jury.*

§ 1753. Mere inadvertent and innoxious separation not generally ground for new trial.

§ 1754. — In some courts this view is not accepted.

§ 1755. Separation before case is opened is always permissible.

§ 1756. In misdemeanors jury may separate during trial.

§ 1757. — And as to felonies less than capital.

§ 1758. — But not generally as to capital felonies.

§ 1759. Court in such cases may adjourn from day to day.

§ 1760. Conflict of opinion as to whether separation after committal of case is permissible.

- § 1761. — Courts holding such separation absolutely fatal.
- § 1762. — Courts holding such separation only prima facie ground for new trial.
- § 1763. — Courts holding such separation fatal only when there has been proof of tampering.
- § 1764. — — The latter is the prevailing view as to misdemeanors.
- § 1765. — Prevailing view is that such irregularities may be cured by consent.
- § 1766. Unsworn or improper officer in charge is ground for new trial; intrusion of officer during deliberations.
- § 1767. Improper reception of materials of proof ground for new trial.
- § 1768. — So of irregular reception of books.
- § 1769. — So of reception of reports of evidence.
- § 1770. — So of irregular communications of court.
- § 1771. — So of conversing with others as to case, and reception of information as to the case.
- § 1772. — So of presence of party.
- § 1773. — So of material testimony submitted by juror or others.
- § 1774. — So of visiting scene of offense.
- § 1775. — But not accidental or necessary visit of stranger.
- § 1776. — — Nor casual exhibition of evidence.
- § 1777. — — And so of the mere approach of strangers, and trivial conversation.
- § 1778. — Presumption is against such communications.
- § 1779. Inattention or ignorance of juror must be excepted to at time.
- § 1780. — But otherwise as to disobedience to court, resulting in injury.
- § 1781. Intoxication, when ground for new trial.
- § 1782. Casting lots by jurors, or other irregularity in their consultations.
- § 1783. — Otherwise as to mere collateral indecorum.
- § 1784. Absolute preadjudication by juror ground for new trial when a surprise.

§ 1785. — Otherwise when party could have known of prejudice in time to challenge.

§ 1786. Absolute incapacity of juror a ground for new trial, but not qualified.

§ 1787. Juror inadmissible to impeach verdict.

§ 1788. — And so are affidavits attacking jury.

6. *Misconduct of Prevailing Party.*

§ 1789. Such misconduct ground for new trial.

§ 1790. — And so of undue influence on jury.

§ 1791. — And so of tampering with evidence.

§ 1792. — And so of tricks of opposite side, when operative.

§ 1793. — But not for remarks of opposite counsel, unless objected to at time.

7. *After-Discovered Evidence.*

§ 1794. In general.

§ 1795. Motion must be special.

§ 1796. — Must be supported by affidavits.

§ 1797. — May be contested.

§ 1798. — Must be usually moved before judgment.

§ 1799. Evidence must be newly discovered.

§ 1800. Acquittal of co-defendant as a witness is no ground.

§ 1801. — Nor is acquittal of defendant of a part of count on which he was excluded as a witness.

§ 1802. Evidence discovered before verdict should be given at once to jury.

§ 1803. If evidence could have been secured at former trial, ground fails.

§ 1804. — And so of withholding of papers which due diligence could have secured.

§ 1805. — Otherwise in cases of surprise.

§ 1806. Party disabled who neglects to obtain evidence on trial.

§ 1807. Evidence must be material and not cumulative.

§ 1808. Surprise is an exception.

§ 1809. — And so when evidence is of a distinct class.

§ 1810. New trial not granted merely to discredit opposing witness.

- § 1811. Subsequent indictment for perjury no ground.
- § 1812. Evidence should be such as to change result on merits.
- § 1813. New defense must not be merely technical.
- § 1814. Acquittal of co-defendant no ground.
- § 1815. Refusal to sever defendants may be ground.

8. *Absence of Defendant on Trial.*

- § 1816. Such absence may be ground for new trial.

9. *Mistake in Conduct of Cause.*

- § 1817. Mistake may be ground, if there was due diligence.
- § 1818. Mistake of law no ground.
- § 1819. — Nor is negligence of counsel.
- § 1820. New trial from unexpected blunder or confusion of witness.
- § 1821. — But not mistake of jury as to punishment.

10. *Surprise.*

- § 1822. Surprise, when genuine and productive of injustice, ground for new trial.
- § 1823. — So of undue haste in hurrying on trial.
- § 1824. — But absence of witness no ground, when testimony is cumulative.
- § 1825. Ordinary surprise at evidence no ground.
- § 1826. — Nor is unexpected bias of witness.

11. *Irregularity in Summoning of Jury.*

- § 1827. Ordinarily defects in jury process no ground.
- § 1828. — And so of irregularity in finding bill.
- § 1829. — Otherwise as to after-discovery of incompetency of juror.
- § 1830. Prejudice of jury, and popular excitement.

IV. AT WHAT TIME MOTION MUST BE MADE.

- § 1831. Motion must be prompt.
- § 1832. When verdict is set aside new trial is at once ordered.

V. TO WHOM MOTION APPLIES.

§ 1833. Any defendant may move.

§ 1834. Defendant must be personally in court. .

§ 1835. New trial may be granted as to one of several.

VI. WHEN CONVICTION IS FOR ONLY PART OF INDICTMENT.**1. *Acquittal on One or Two Counts.***

§ 1836. New trial goes only to convicted counts.

2. *Conviction of Minor Offense Included in Major.*

§ 1837. Conviction of minor offense is acquittal of major.

VII. BY WHAT COURTS.**1. *Appellate Court.***

§ 1838. Appellate court may revise evidence from notes.

2. *When Judge Trying Cause Dies or Leaves Office.*

§ 1839. Conflict of opinion as to whether successor of judge can hear motion.

VIII. IN WHAT FORM.

§ 1840. Rule to show cause to be first granted.

§ 1841. Motion must state reasons.

IX. COSTS.

§ 1842. Costs may await second trial.

X. ERROR.

§ 1843. Error does not usually lie to action of court.

I. IN WHAT NEW TRIALS CONSIST.

§ 1721. A NEW TRIAL IS A RE-EXAMINATION AFTER VERDICT OF FACTS AND LAW NOT OF RECORD. A new trial is a re-examination by jury, according to the forms of the common law, of the facts and legal rights of the parties upon disputed facts, which it is in the discretion of the court to grant or refuse, but which is claimable as a right when evidence has been improperly received or rejected,

or incorrect directions in law have been given.¹ No error, however, which is apparent on the record, and which can be noticed in arrest of judgment, will ordinarily be ground for a new trial.² Thus, a new trial will not be granted because a letter was omitted in the prisoner's name, in the title on the back of the bill found by the grand jury.³

II. IN WHAT CASES COURTS HAVE AUTHORITY TO GRANT NEW TRIALS.

1. *After Acquittal.*

§ 1722. NO NEW TRIAL AFTER ACQUITTAL. After an acquittal of the defendant, on an indictment for either felony or misdemeanor, for which imprisonment or other personal discipline can be imposed, there can in general be no new trial, though the result be produced by error of law or misconception of fact.¹

¹ 4 Chitty's Gen. Prac. 31; 1 Stark. Ev. 468; Roberts v. State, 3 Ga. 310; Bernasconi v. Farebrother, 3 Barn. & Ad. 372, 23 Eng. C. L. 168; New Castle v. Broxtowe, 4 Barn. & Ad. 273, 24 Eng. C. L. 126.

² Minor v. Mead, 3 Conn. 289; Price v. State, 67 Ga. 723.

³ State v. Duestoe, 1 Bay (S. C.) 377.

¹ 4 Black. Com. 361; Back. Ab. Trial L. 9; 2 Hawk., ch. 47, § 12. CAL.—People v. Webb, 38 Cal. 467; People v. Bangenenaaur, 40 Cal. 613; People v. Horn, 70 Cal. 17, 11 Pac. 470. IND.—State v. McCorry, 2 Blackf. 5. MD.—State v. Shilds, 40 Md. 301. MASS.—Com. v. Cunningham, 13 Mass. 245. MICH.—People v. Taylor, 117 Mich. 583, 76 N. W. 158. MISS.—Morris v. State, 16 Miss. (8 Smed. & M.) 762; State v. Anderson, 11

Miss. (3 Smed. & M.) 751. MO.—State v. Baker, 19 Mo. 633. N. J.—State v. Kanouse, 20 N. J. L. (1 Spen.) 115. N. C.—State v. West, 71 N. C. 263; State v. Padgett, 82 N. C. 544. PA.—Hollister v. Com., 60 Pa. St. 103; Guffy v. Com., 6 Grant 66. R. I.—State v. Lee, 10 R. I. 494. S. C.—State v. Relley, 2 Brev. L. 126. TENN.—State v. Norvell, 10 Tenn. (2 Yerg.) 24, 24 Am. Dec. 458; Campbell v. State, 17 Tenn. (9 Yerg.) 333, 30 Am. Dec. 417; Esmon v. State, 31 Tenn. (1 Swan) 14; State v. Cameron, 50 Tenn. (3 Heisk.) 78. FED.—United States v. Ghibert, 2 Sumn. 19, Fed. Cas. No. 15204. ENG.—R. v. Sutton, 5 Barn. & Ad. 52, 27 Eng. C. L. 32, 2 Nev. & M. 57; R. v. Duncan, 44 L. T. N. S. 521; R. v. Bortrand, L. R. 1 P. C. 520, overruling R. v. Scaife, 17 Ad. & E. N. S. (17 Q. B.) 238, 79 Eng. C. L. 237, 18 Ad. & E. N. S.

§ 1723. — OTHERWISE WHEN VERDICT WAS FRAUDULENT. In cases, however, where the verdict has been ob-

(18 Q. B.) 773, 83 Eng. C. L. 771, cited, *infra*, § 1727.

See, also, *supra*, § 1364.

In New York, in a prominent case, where the defendants had been acquitted on an indictment for conspiracy, a motion for a new trial on behalf of the public prosecutor was entertained by the Supreme Court. "The right of a court to grant a new trial in case the defendant has been acquitted," said Marcy, J., after refusing a new trial on the merits, "is called in question by the defendant. That such right does not exist, where the ground of the application is that the finding is against evidence, is conceded; but whether a new trial can be granted where the acquittal has resulted from the error of the judge in stating the law to the jury, seems to be involved in much doubt. It is a very important question, and not necessary to be now settled; the court have, therefore, deemed it discreet to forbear expressing an opinion on it till a case shall arise requiring them to do so."—*People v. Mather*, 4 Wend. (N. Y.) 266, 21 Am. Dec. 122.

—In a subsequent case, however, the point seems to have been decided substantially in accordance with the settled practice.—*People v. Comstock*, 8 Wend. (N. Y.) 549.

In *State v. Ragsdale*, 78 Tenn. (10 Lea) 671, a new trial was granted on motion of the state in a case where the jury imposed in their verdict a fine instead of imprisonment as the law required. See, *supra*, § 1689, and cases there cited.

As ruling that no error of law by the judge will sustain a revision, see *Black v. State*, 36 Ga. 447, 91 Am. Dec. 772; *Hines v. State*, 24 Ohio St. 134.

Compare: *Supra*, § 1706.

Acquittal on one or more counts and conviction on others, on new trial granted on application of accused, he can be tried again upon the counts under which he was convicted, only; he can not be retried on the counts under which he was acquitted. See, *infra*, § 1836.

Acquittal of charge of converting money to own use a bar to subsequent prosecution for failure to pay over the same money.—*State v. Cameron*, 50 Tenn. (3 Helsk.) 78.

Identity of transactions controlling consideration in determining whether former acquittal bars subsequent prosecution.—*State v. Price* (dis. op.), 127 Iowa 301, 103 N. W. 195.

Plea of former acquittal insufficient which does not state cause of discharge, and whether it was with defendant's consent.—*People v. White*, 68 Mich. 648, 37 N. W. 34.

Second trial on another count in the indictment may be had where no conviction is sought upon the count upon which acquitted.—*Major v. State*, 36 Tenn. (4 Sneed) 597.

As to right to try accused on count on which he has been acquitted on reversal of judgment on count in same indictment on which he was convicted, see note, 27 Am. Dec. 480.

tained by fraud of the defendant, such, for instance, as the collusive or forcible keeping back witnesses for the prosecution, or the submitting the case by trick without evidence, the verdict may be treated as a nullity.¹

§ 1724. — So IN QUASI CIVIL CASES. Another exception is to be found in cases where the object of the proceeding is substantially to try a right, and the verdict would bind the right, as in cases of indictment for non-repair of a highway or a bridge. In such case a new trial may be had after verdict for the defendant, if evidence have been improperly received, or there have been misdirection, or a verdict contrary to the evidence.¹ But an indictment for obstructing a navigation has been regarded as not within this second exception, inasmuch as in such a case the defendant is liable on conviction to fine and imprisonment, and the verdict of acquittal does not bind any right.² The test seems to be this: where the issue goes to civil rights, and where only a fine can be imposed, there can be a new trial after an acquittal. Where the punishment involves imprisonment, or other personal

¹ Supra, § 1381.

Acquittal procured by fraud does not prevent subsequent trial for the same offense.—*State v. Swenson*, 79 N. C. 632.

Where the complaint was made to a justice by a person employed to do so by the defendant, and the warrant was served, and witnesses summoned by the defendant's direction, and an attorney retained and paid by him to appear on the part of the state, and the circumstances of the case were so represented to the justice that he imposed a lighter fine than he otherwise would have done, the case was held open to another trial.—*State v. Little*, 1 N. H. 257; see *Com. v. Jackson*, 4 Va. (2 Va. Cas.) 501; supra, § 1381.

¹ *R. v. Chorley*, 12 Ad. & E. N. S. (12 Q. B.) 515, 64 Eng. C. L. 513 (in which case, however, proceedings were subsequently stayed); *R. v. West Riding, Inhabitants of*, 2 East 362, n.; *R. v. Russell*, 3 El. & B. 942, 77 Eng. C. L. 942; *R. v. Crickdale*, 3 El. & B. 947, n.

Present tendency is to refuse new trials even in this class of acquittals.—*R. v. Duncan*, L. R. 7 Q. B. Div. 198; *R. v. Southampton*, L. R. 19 Q. B. Div. 590, affirming *R. v. Wandsworth*, 1 Barn. & Ald. 63.

² *R. v. Russell*, 3 El. & B. 942, 77 Eng. C. L. 942.

As to cases in the courts where new trials have been granted on ground of fraud or by acquittal, see, supra, § 1381.

discipline, the acquittal is final, unless fraudulently obtained.³

§ 1725. MOTION FOR NEW TRIAL ONLY APPLICABLE TO COUNTS WHERE THERE HAS BEEN A CONVICTION. It has been held in some jurisdictions, that where a defendant is acquitted upon one count and convicted on another, a new trial goes to the whole case;¹ but by the general practice, where a defendant has been acquitted on some counts and convicted upon others, and the counts are for distinct offenses, a motion for a new trial made by him generally is only applicable to the counts upon which he was convicted.² It may well, indeed, be argued, that when the counts are simply several formal variations in stating the same offense, then a new trial opens the whole case;³ though it is otherwise when the counts are for separate offenses.⁴ But an acquittal on a particular count, unless in cases of fraud or mistake, must ordinarily be regarded as final.⁵

§ 1726. CONVICTION OF MINOR OFFENSE IS ACQUITTAL OF MAJOR. Where a defendant, being indicted for burglary and larceny, is acquitted of burglary, but convicted of larceny, it has been held that the revision of the case pervades the whole indictment, and that on the second trial he is to be arraigned on the burglary as well as the larceny portion of the count.¹ But the sounder conclusion is,

³ Jones v. State, 15 Ark. 261.

This is expressly stated by Lord Coleridge, in R. v. Duncan, 44 L. T. N. S. 522.

¹ State v. Stanton, 23 N. C. (1 Ired. L.) 424; Leslie v. State, 18 Ohio St. 390; Jarvis v. State, 19 Ohio St. 585; State v. Commissioners, 3 Hill L. (S. C.) 239.

See, also, *infra*, § 1836.

² *Infra*, § 1837. IOWA—State v. Malling, 11 Iowa 239. LA.—State v. Fritz, 27 La. Ann. 360. MO.—State v. Kettleman, 35 Mo. 105.

OHIO—Jarvis v. State, 19 Ohio St. 585. TENN.—Campbell v. State, 17 Tenn. (9 Yerg.) 333, 30 Am. Dec. 417; Esmon v. State, 31 Tenn. (1 Swan) 14. VT.—State v. Kittle, 2 Tyl. 471. VA.—Com. v. Stuart, 69 Va. (28 Gratt.) 950. FED.—United States v. Davenport, 1 Deady 264, Fed. Cas. No. 14920.

³ Leslie v. State, 18 Ohio St. 390.

⁴ See, *infra*, § 1836.

⁵ See, *supra*, § 1722.

¹ State v. Morris, 1 Blackf. (Ind.) 37.

that when the jury has the whole case before them, a conviction on the minor offense alone is virtually an acquittal of the major.² And for this reason a conviction of manslaughter, on an indictment for murder, is an acquittal of murder.³

2. *After Conviction.*¹

§ 1727. GENERALLY NEW TRIAL MAY BE GRANTED AT DISCRETION OF COURT. In England, as well as in this country, a defendant may have a new trial at the discretion of the court, after a verdict of conviction of a misdemeanor.² In cases of felony or treason, the former understanding in England was that no new trial in any case could be granted where the proceedings have been regular;³ but if the conviction appeared to the judge to be improper, he might respite the execution to enable the defendant to apply for a pardon.⁴ In England an inferior court can not grant a new trial in a criminal case, on the merits, though it can do so where there has been some irregularity in the proceedings.⁵ And where a court of quarter

² Supra, § 1396; infra, § 1837.

³ Supra, § 1396; infra, § 1837, and cases there cited.

¹ For Ohio statute, see Code of Criminal Procedure, § 192; Warren's Ohio Criminal Law, 1870, p. 135.

² 1 Chitty Cr. L. 653. MASS.—Com. v. Green, 17 Mass. 513. N. H.—State v. Prescott, 7 N. H. 287. N. Y.—People v. Comstock, 8 Wend. 549; People v. Vermilyea, 7 Cow. 369. S. C.—State v. Slack, 1 Bailey L. 330. FED.—United States v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15204.

³ 1 Chitty Cr. L. 653, referring to 6 Term R. 525, 638; East 416, n. b; 4 B. & A. 275.

⁴ As a departure from this rule may be noticed R. v. Scalfé, 2 Den.

C. C. 281, 17 Ad. & E. N. S. (17 Q. B.) 238, 79 Eng. C. L. 237; 18 Ad. & E. N. S. (18 Q. B.) 773, 83 Eng. C. L. 771, 2 D. P. C. 553.

In R. v. Scalfé, 2 Den. C. C. 281, 17 Ad. & E. N. S. (17 Q. B.) 238, 79 Eng. C. L. 237, 18 Ad. & E. N. S. (18 Q. B.) 773, 83 Eng. C. L. 771, 2 D. P. C. 553, there were three defendants, two of whom were convicted and one acquitted. There was a new trial as to all three defendants.

This case is overruled, however, by R. v. Bertrand, L. R. 1 P. C. 520.

⁵ 2 Tidd's Prac. 905, 13 East 418, n. b; Burn's J., New Trial; Bac. Abr. Trial (L); R. v. Peters, 1 Burr. 568, 97 Eng. Repr. 452; R. v. Day, 1 Say. 203, 96 Eng. Repr.

sessions had ordered a new trial, after a verdict of guilty against two prisoners, on the ground that, after the jury had retired, one of them had separated from his fellows and had conversed with a stranger respecting his verdict, and that therefore the verdict was bad, on a writ of error brought, it was held that the new trial had been properly ordered.⁶

§ 1728. — IN THIS COUNTRY THIS APPLIES TO ALL CLASSES OF CRIMES. In this country the uniform and unquestioned practice, down to a comparatively late period, has been to extend to criminal cases, so far as the revision of verdicts is concerned, the same principles which have been established in civil actions; and though, except in cases of fraud, no instance exists where an acquittal has been disturbed, new trials in cases of conviction will be granted, as will be presently shown more fully, whenever it appears there was misconduct of the jury, misdirection by the judge, or injustice in the procedure. In 1832, however, the supposed English rule was pronounced by the Supreme Court of New York in force as part of the common law of the land;¹ and in 1833, in a case of great interest, it was declared by Judge Story,² that not only was there no case in this country where a new trial, in a capital case, had been granted on the merits, where the authority of the court on the subject-matter had been agitated, but that after a verdict of a jury regularly rendered on the facts in such case, it was out of the power of a common-law court to interpose, except by the recommendation of pardon. The common law doctrine, it was held, so far from being of imperfect application to this country, was invested with additional strength, not only by the federal Constitution, but by the constitutions of most of the individual states. "Nor shall any person be

852; *R. v. Mayor of Oxford*, 3 Nev. & M. 2.

⁶ *R. v. Fowler*, 4 Barn. & Ald. 273, 6 Eng. C. L. 481.

¹ *People v. Comstock*, 8 Wend. (N. Y.) 549.

² *United States v. Gibert*, 2 Sumn. 19, Fed. Cas. No. 15204.

subject, for the same offense, to be twice put in jeopardy of life or limb''; and, "No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."³ But plausibly as the position was sustained by Judge Story, it was afterwards abandoned in the court in which it was uttered, and is now so universally rejected that its extended discussion is no longer necessary. It is sufficient to say that neither in federal nor state courts are there now any doubts expressed as to the right of the proper court to grant a new trial in any case in which it considers the verdict to be unjust.⁴

³ Whether these prohibitions bear on the state courts has been doubted (*People v. Goodwin*, 18 John. (N. Y.) 187, 9 Am. Dec. 203; *United States v. Gilbert*, 2 Sumn. 19, Fed. Cas. No. 15204); though the inclination of practice seems to be to regard them as limited to the federal tribunals (*State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450); and it is clear, that in the two leading cases in Massachusetts and New York, where the subject was disposed of, the result was placed on common law reasoning exclusively.—*Com. v. Green*, 17 Mass. 515; *People v. Comstock*, 8 Wend. (N. Y.) 549.

In most of the states, there are, however, similar limitations; and even where no such constitutional restriction exists, it is doubtful whether equal force is not applied by the doctrines of the common law.—*People v. Comstock*, 8 Wend. (N. Y.) 549; *United States v. Gilbert*, 2 Sumn. 19, Fed. Cas. No. 15204; see, supra, § 1426.

⁴ MASS.—*Com. v. Hardy*, 2 Mass. 303. N. Y.—*People v. Comstock*, 8 Wend. 549; *People v. Willmans*, 4 Hill 10; *People v. Bush*, 4 Hill

134; *People v. Newman*, 5 Hill 295; *People v. Bodine*, 1 Den. 281; *People v. Morrison*, 1 Park. Cr. Rep. 624; *People v. Judges of Dutchess County*, 2 Barb. 282. N. C.—*State v. Sparrow*, 7 N. C. (3 Murph. L.) 487; *State v. Lipsey*, 14 N. C. (3 Dev. L.) 485; *State v. Miller*, 18 N. C. (1 Dev. & B. L.) 500; *State v. Benton*, 19 N. C. (2 Dev. & B. L.) 196; *State v. Douglass*, 63 N. C. 500. PA.—*Com. v. Brown*, 3 Rawle 207; *Com. v. Clue*, 3 Rawle 500; *Com. v. Flanigan*, 7 Watts & S. 415. S. C.—*State v. Fisher*, 2 Nott. & McC. L. 261; *State v. Sims*, 2 Ball. L. 29; *State v. Anderson*, 2 Ball. L. 565; *State v. Hooper*, 2 Ball. L. 37. TENN.—*State v. Crawford*, 10 Tenn. (2 Yerg.) 66; *Cassels v. State*, 12 Tenn. (4 Yerg.) 152; *State v. Jim*, 23 Tenn. (4 Humph.) 289. VA.—*Com. v. Jones*, 28 Va. (1 Leigh) 598; *Ball's Case*, 35 Va. (8 Leigh) 726; *M'Cune v. Com.*, 41 Va. (2 Rob.) 790; *Grayson v. Com.*, 47 Va. (6 Gratt.) 712. FED.—*United States v. Fries*, 3 U. S. (3 Dall.) 515, 1 L. Ed. 701; *United States v. Williams*, 1 Cliff. 5, Fed. Cas. No. 16707; *United States v. Conner*,

III. FOR WHAT REASONS NEW TRIALS WILL BE GRANTED.

§ 1729. **IN GENERAL.** Assuming it to be law that in all cases where the application comes from the defendant, it is discretionary in the courts to grant new trials, the cases in which that discretion may be exercised will be considered under the following heads:

1. *Misdirection by the Court Trying the Cause.*

§ 1730. **ANY MATERIAL MISBULING GROUND FOR NEW TRIAL.** Any misdirection by the court trying the case, in point of law, on matters material to the issue, is good ground for a new trial;¹ and such misdirection, even upon one point, is sufficient, although the jury might have properly found their verdict upon another point, as to which there was no misdirection;² while if the error was immaterial, irrelevant,³ or trivial,⁴ and justice has been done, the court will not set aside the verdict, nor enter into a dis-

3 McC. L. 386, Fed. Cas. No. 2708; United States v. Harding, 1 Wall. Jr. 127, Fed. Cas. No. 15301.

See, also, Whart. St. Tr. 598, and cases hereafter cited.

As to English practice, see remarks of Chief Justice Tindal in *Mellin v. Taylor*, 2 Hodg. 126, 127; and see, also, *Levi v. Milne*, 4 Bing. 198, 130 Eng. Repr. 743.

¹ IND.—*McDonald v. State*, 63 Ind. 544. IOWA—*State v. Meshek*, 51 Iowa 308, 1 N. W. 685. N. Y.—*People v. Cogdell*, 1 Hill 95, 37 Am. Dec. 297; *People v. Thomas*, 3 Hill 169; *People v. Townsend*, 3 Hill 479; *People v. Bodine*, 1 Den 281, 1 Edm. Sel. Cas. 36. PA.—*Com. v. Parr*, 5 Watts & S. 345. TEX.—*Maddox v. State*, 12 Tex. App. 429.

² GA.—*Landis v. State*, 70 Ga. 652, 48 Am. Rep. 588. IOWA—*State v. Hardin*, 46 Iowa 623, 26

Am. Rep. 174. NEV.—*State v. McCluer*, 5 Nev. 132. MISS.—*Harris v. State*, 47 Miss. 318. N. Y.—*People v. Bodine*, 1 Den. 280. TEX.—*Ballew v. State*, 36 Tex. 98.

In *Parnell v. Com.*, 86 Pa. St. 260, it was said that in a capital case the Supreme Court will reverse when the charge is doubtful and liable to be misunderstood.

³ *State v. Lewis*, 14 Mo. App. 197; *State v. Grady*, 83 N. C. 643; *Williams v. State*, 24 Tex. App. 17, 5 S. W. 655; *Hayse v. United States*, 32 Fed. 662.

⁴ GA.—*Hendricks v. State*, 73 Ga. 577. ILL.—*Leigh v. People*, 113 Ill. 372. IOWA—*State v. George*, 62 Iowa 682, 18 N. W. 298. N. Y.—*People v. Dimick*, 107 N. Y. 13, 14 N. E. 178, revising 14 Hun 616, 5 N. Y. Cr. Rep. 185. TENN.—*Heard v. State*, 83 Tenn. (15 Lea) 218.

cussion of the question of law.⁵ Material error in one instruction calculated to mislead, however, is not cured by subsequent contradictory instruction,⁶ unless the prior erroneous instruction be expressly recalled,⁷ or no prejudice to the defendant resulted.⁸ Error committed by the court in the allowance or refusal of challenges,⁹ or the allowance or refusal of a motion, either for continuance,¹⁰ or for compelling the prosecutor to elect,¹¹ or of any other peremptory motion,¹² or even in making incidental re-

⁵ CONN.—*State v. Tudor*, 5 Day 329, 5 Am. Dec. 162. GA.—*Lewis v. State*, 33 Ga. 131; *Tate v. State*, 46 Ga. 148. ILL.—*Kennedy v. People*, 40 Ill. 488; *Upstone v. People*, 109 Ill. 169. IOWA.—*State v. McIntire*, 58 Iowa 572, 12 N. W. 593. LA.—*State v. Johnson*, 31 La. Ann. 368. MO.—*State v. Underwood*, 76 Mo. 630. OHIO.—*Stewart v. State*, 1 Ohio St. 66. WIS.—*State v. Downer*, 21 Wis. 275. FED.—*United States v. Smith*, 3 Blatchf. 255, Fed. Cas. No. 16320.

See, also, *supra*, § 1643.

New trial granted in a case where the judge unduly pressed agreement of jury. See *State v. Bybee*, 17 Kan. 462.

New trial will not be granted because the judge charged the grand jury in the presence of the traverse jury, on the general question of the law bearing on the particular issue.—*Johnson v. State*, 59 Ga. 189.

⁶ *Clem v. State*, 31 Ind. 480; *Howard v. State*, 50 Ind. 190; *Stowell v. State*, 60 Iowa 535, 15 N. W. 417; *supra*, § 1643.

⁷ *State v. Morris*, 47 Conn. 179; *State v. Williams*, 69 Mo. 110.

⁸ *State v. Hopper*, 71 Mo. 423.

⁹ *Supra*, §§ 1628-1630, 1711. LA.—*State v. Horn*, 34 La. Ann. 100.

N. Y.—*People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People v. Rathbun*, 21 Wend. 509; *People v. Bodine*, 1 Den. 281. PA.—*Com. v. Leshner*, 17 Serg. & R. 155. TEX.—*Vaughan v. State*, 21 Tex. 452; *Casinoca v. State*, 12 Tex. App. 554; *Laubach v. State*, 12 Tex. App. 583. VA.—*Armistead v. Com.*, 38 Va. (11 Leigh) 657; *Com. v. Heath*, 40 Va. (1 Rob.) 135.

Compare: *Henry v. State*, 23 Tenn. (4 Humph.) 270.

Challenge to poll, being in the nature of a pleading, the decision thereon may be reviewed.—*Hayes v. Thompson*, 15 Abb. Pr. N. S. (N. Y.) 220; affirmed, 2 Hun 518, 5 Thomp. & C. 713; *Clark v. Van Vracken*, 20 Barb. (N. Y.) 278.

Challenge to favor not reviewable.—*People v. Tweed*, 11 Hun (N. Y.) 195; *United States v. McHenry*, 6 Blatchf. 503, Fed. Cas. No. 15681.

¹⁰ *People v. Vermilyea*, 7 Cow. (N. Y.) 369; *State v. Files*, 3 Brev. (S. C.) 304; *Vance v. Com.*, 4 Va. (2 Va. Cas.) 162; *Bledsoe v. Com.*, 27 Va. (6 Rand.) 674; *Com. v. Gwatkin*, 37 Va. (10 Leigh) 687.

See, also, *supra*, § 1535.

¹¹ *People v. Costello*, 1 Den. (N. Y.) 83. *Supra*, §§ 351 et seq.

¹² *Com. v. Church*, 1 Pa. St. 105, 44 Am. Dec. 112.

marks injurious to the defendant,¹³ is ground for a new trial. Other questions as to the structure of the charge have been already discussed.¹⁴ It should be here observed, that a mistaken exercise of discretion, which can not be reached in error, may be reached by a motion for a new trial.¹⁵

§ 1731. — AND SO AS TO ERROR AS TO PRESUMPTION OF FACT. The due degree of weight to be given to presumptions of law which legitimately arise in the case, it is for the court to determine,¹ though if the court instruct a jury that an inference of fact is a presumption of law, a new trial will be awarded.² Thus where the judge charged that the non-production, by the defendant, of evidence of good character should weigh against the defense, it was held error;³ and where there was evidence that a murder had been committed, and that the house in which the dead body was had been subsequently set on fire under such circumstances as to raise a suspicion that the same was done by the perpetrator of the murder to conceal that offense, and the evidence left it doubtful as to whether the prisoner was in the vicinity of the house when the fire was set, and the court charged the jury, that if the prisoner might have been at the scene of the fire, "the

¹³ State v. Donovan, 61 Iowa 369, 16 N. W. 206.

¹⁴ Supra, § 1643.

¹⁵ See, supra, § 1317.

¹ Chitty's Gen. Proc. 42; People v. Genung, 11 Wend. (N. Y.) 18, 25 Am. Dec. 594; Watson v. People, 64 Barb. (N. Y.) 130; Cross v. State, 55 Wis. 261, 12 N. W. 425; Attorney-General v. Good, McClell. & Y. 286.

See, also, 2 Whart. Crim. Ev. (Hilton's ed.), §§ 707 et seq.; and infra, § 1736.

² Supra, § 1644; People v. Messersmith, 61 Cal. 246; Hendricks v.

State, 26 Ind. 493; Moore v. State, 85 Ind. 90; State v. Bailey, 60 N. C. (1 Wins.) 137; State v. Whitney, 7 Ore. 386.

On this point the reader is particularly referred to 2 Whart. Crim. Ev. (Hilton's ed.), §§ 707 et seq.; and see, supra, §§ 1647, 1648. ³ People v. Bodine, 1 Den. (N. Y.) 283.

Compare: People v. White, 22 Wend. (N. Y.) 167.

As to burden of proof, see 1 Whart. Crim. Ev. (Hilton's ed.), § 319.

As to presumptions, see 2 Whart. Crim. Ev. (Hilton's ed.), § 707.

onus was cast upon her to get rid of the suspicion which thus attached to her," and that she was bound to show where she was at the time of the fire, it was held that the ruling was erroneous, and ground for a new trial.⁴ The same conclusion is reached where a judge takes it upon himself to declare a witness to be untrustworthy.⁵ And it has been held error in a judge to say, without qualification, that an alibi is a defense which should be offered at the preliminary hearing,⁶ or that an alibi is to be regarded with suspicion.⁷

§ 1732. OMISSION TO CHARGE CUMULATIVELY NO ERROR. The omission by the judge, in summing up specifically, to leave to the jury a point made in the course of the trial,—his attention not being expressly called to it,—is no ground for a motion for a new trial, if the whole of the case was substantially left to them.¹

§ 1733. JUDGE NOT REQUIRED TO CHARGE AS TO UNDISPUTED LAW, WHEN NO POINTS ARE TENDERED. Where there is no dispute as to the law, the judge can not be required, where no points are tendered under the statute, to charge generally on the law.¹

§ 1734. — OTHERWISE WHEN JURY FALL INTO ERROR FROM WANT OF INSTRUCTIONS. Where, however, from the absence of proper instructions, the jury fall into error, a new trial will be granted.¹ Thus, the court is bound, if required, to instruct the jury that unless they are satis-

⁴ *People v. Bodine*, 1 Den. (N. Y.) 282. See 2 Whart. Crim. Ev. (Hilton's ed.), §§ 707 et seq.

⁵ *Bishop v. State*, 43 Tex. 390.

⁶ *Spencer v. State*, 50 Ala. 124; *Sullivan v. People*, 31 Mich. 1.

⁷ *Supra*, § 1646.

¹ *Supra*, § 1645; *Robinson v. Gleadow*, 2 Scott 250, 2 Bing. N. C. 156.

¹ Thus, a new trial was refused when the complaint was that the

judge, although requested, declined to charge the jury, there being no dispute as to the law of the case; the trial closing so late on Saturday night that, had the jury been charged, they must either have been dismissed or kept over during Sunday; and the verdict being fully supported by the evidence. — *People v. Gray*, 5 Wend. (N. Y.) 289. *Supra*, § 1644.

¹ *Supra*, § 1644; *Armistead v.*

fied beyond reasonable doubt, the defendant must be acquitted.² And any other failure on the part of the court to state the law, which failure results in an erroneous verdict, will exact a new trial.³

§ 1735. YET ABSTRACT DISSERTATIONS BY JUDGE ARE NOT REQUIRED. It is not the duty of a court, in conducting a trial, to determine abstract propositions submitted by counsel,—e. g., whether certain testimony, which had been given, bore upon the issue, or only on the credit of witnesses; it is enough if the court respond to all objections to testimony taken by either party, and give the proper instructions to the jury.¹ “Courts,” said the Supreme Court of New York, “are under no obligation to listen to abstract propositions from counsel, and are not bound to explain them on the trial of causes.”² If, however, incorrect abstract propositions are laid down, and the jury are misled by them, the verdict will be avoided.³

§ 1736. JUDGE MAY GIVE OPINION AS TO WEIGHT OF EVIDENCE. A judge has a right to express his opinion to the jury on the weight of evidence, and to comment thereon as much as he deems necessary for the course of justice;¹

State, 43 Ala. 340; Thomas v. State, 67 Ga. 764; State v. Jones, 87 N. C. 547.

See Hilliard on New Trials (1873) 528, and supra, §§ 1643 et seq.

² Ibid. See, supra, §§ 1645 et seq.

³ Supra, §§ 1647, 1648.

¹ People v. Walsh, 43 Cal. 447; State v. Melton, 37 La. Ann. 82; People v. Cunningham, 1 Den. (N. Y.) 524, 43 Am. Dec. 709; Crabtree v. State, 69 Tenn. (1 Lea) 267; Proffitt v. State, 5 Tex. App. 51.

See Hilliard on New Trials (1873), pp. 45, 261; and supra, §§ 1645-1650.

² GA.—McCoy v. State, 15 Ga. 205. MASS.—Com. v. Tarr, 86 Mass. (4 Allen) 315. N. Y.—People v. Cunningham, 1 Den. 524, 43 Am. Dec. 709; People v. Robinson, 2 Park. Cr. Rep. 285. FED.—Etting v. United States Bank, 24 U. S. (11 Wheat.) 59, 6 L. Ed. 419.

³ Supra, § 1730.

¹ Supra, § 1646; see Am. Law Reg. Jan. 1853; see, also, Tidwell v. State, 70 Ala. 33; Peters v. State, 67 Ga. 29; Com. v. Child, 27 Mass. (10 Pick.) 252; State v. Smith, 10 Rich. L. (S. C.) 341.

Contra: Perkins v. State, 50 Ala. 154; State v. Dick, 60 N. C. (2

and an erroneous opinion on matter of fact, it is said, expressed by the judge in his charge, is no ground for new trial, unless the jury are thereby led to believe that such fact was withdrawn from their consideration.² But it is ground for a new trial that a judge expresses himself as to inferences of fact, so that the jury understand him to be stating principles of law.³ And this is eminently the case when a question of fact is taken from the

Wins.) 798; *State v. Thompson*, 21 W. Va. 741.

"I can not, for my part, see how the jury can hesitate a moment to convict the prisoner on the third count," was held in Pennsylvania not to be, on the facts, too strong in instruction.—*Johnston v. Com.*, 85 Pa. St. 54, 27 Am. Rep. 622.

Strong, J., in *Kilpatrick v. Com.*, 31 Pa. St. 198, says: "A judge may rightfully express his opinion respecting the evidence, yet not so as to withdraw it from the consideration and decision of the jury." Adopted in *Johnston v. Com.*, 85 Pa. St. 54, 65.

As to adverse statute in California, see, *supra*, § 1646.

So in Illinois and Virginia, *supra*, § 1646.

So in Indiana.—*Baker v. State*, 48 Ind. 163; *State v. Banks*, 48 Ind. 197, and cases cited, *supra*, § 1646.

So in Missouri.—*State v. Jones*, 61 Mo. 232, and cases cited, *supra*, § 1646.

² *Griffin v. State*, 76 Ala. 32; *Layton v. State*, 56 Miss. 791; *People v. Rathbun*, 21 Wend. (N. Y.) 509; *Com. v. Gallagher*, 4 Pa. Law Jour. 517, 2 Clark (Pa.) 798; *State v. Smith*, 12 Rich. L. (S. C.) 430.

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Contra: *Smith v. State*, 43 Tex. 103; *supra*, §§ 1644-1646.

³ *Supra*, § 1731. ALA.—*Spencer v. State*, 50 Ala. 124; *McAdory v. State*, 62 Ala. 154. CAL.—*People v. Casey*, 53 Cal. 360; *People v. Carrillo*, 54 Cal. 63; *People v. Wong*, 54 Cal. 151, 35 Am. Rep. 69. CONN.—*State v. Williamson*, 42 Conn. 261. GA.—*Cicero v. State*, 54 Ga. 156; *Lovett v. State*, 60 Ga. 257; *Holt v. State*, 62 Ga. 614; *Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717. ILL.—*Bill v. People*, 14 Ill. 432. MO.—*State v. Ross*, 29 Mo. 32. NEB.—*Brown v. State*, 9 Neb. 157, 2 N. W. 378. NEV.—*State v. Rigg*, 10 Nev. 284. N. Y.—*Woodin v. People*, 1 Park. Cr. Rep. 164; *Watson v. People*, 64 Barb. 130. OHIO.—*Nolan v. State*, 19 Ohio 131. R. I.—*State v. Lynott*, 5 R. I. 295. TEX.—*Skidmore v. State*, 43 Tex. 93; *Collins v. State*, 5 Tex. App. 38; *Warren v. State*, 22 Tex. App. 383, 3 S. W. 240; *Baron v. State*, 23 Tex. App. 462, 5 S. W. 237.

As to error in charging presumptions of fact as presumptions of law, see, fully, *supra*, § 1731; 2 Whart. Crim. Ev. (Hilton's ed.), §§ 707 et seq.; and *supra*, § 1645.

consideration of the jury,⁴ or a detrimental fact is assumed without proof.⁵

There are states, however, in which by statute the court is prohibited from expressing an opinion as to whether the facts prove a particular crime.⁶

That in some jurisdictions there may be an absolute direction to acquit or convict will be hereafter seen.⁷

Any side remark by the judge calculated to unjustly prejudice the defendant, may be ground for new trial,⁸ but ordinarily, such remarks must be excepted to before the jury retire.⁹

§ 1737. **PREADJUDICATION BY JUDGE MAY BE GROUND FOR NEW TRIAL.** It has already been incidentally observed that preadjudication by a judge is not ground for challenge, the only remedies being motion for new trial or impeachment.¹ Should the judge either preadjudicate, in the presence of the jury, the case in advance of the reception of the evidence,² or throw out during the trial unjust remarks prejudicial to the defendant, a new trial may be

⁴ *State v. Williamson*, 42 Conn. 401; *Roach v. State*, 77 Ill. 25; *Com. v. Davis*, 77 Mass. (11 Gray) 4; *State v. McKinsey*, 80 N. C. 458; *Wilbanks v. State*, 10 Tex. App. 642.

In *Pannell v. Com.*, 86 Pa. St. 260, a sweeping condemnation of expert testimony was held error.

⁵ *Chambers v. People*, 105 Ill. 409; *State v. Rothschild*, 68 Mo. 52; *State v. Ticket*, 13 Nev. 502.

⁶ See *Edgar v. State*, 43 Ala. 312; *State v. Dick*, 60 N. C. (2 Wins.) 45, 86 Am. Dec. 439; *State v. Dancy*, 78 N. C. 437.

In Massachusetts, see *Com. v. Foran*, 110 Mass. 179.

The California Constitution of 1879 precludes all opinions on

facts; and so in Texas.—*Hill v. State*, 11 Tex. App. 379.

In Texas, error of this class must be excepted to at the time.—*White v. State*, 19 Tex. App. 343.

⁷ *Infra*, § 1751.

⁸ *People v. Hare*, 57 Mich. 505, 24 N. W. 843; *Cartwright v. State*, 80 Tenn. (12 Lea) 620.

⁹ *State v. Wilkinson*, 76 Me. 317.

¹ *Supra*, § 1538. See *Foreman v. Hunter*, 59 Iowa 550, 13 N. W. 659.

² See *United States v. Fries*, Whart. St. Tr. 458, 606, Fed. Cas. No. 5126 (cited, *supra*, § 1495, and *infra*, §§ 1784, 1787), in which case the pre-announcement by Judge Chase of his views as to the law of the case was one of the grounds of impeachment.

granted.* But this is not the case when the remarks complained of were part of a charge to the grand jury, in the presence of the traverse jury, discussing generally crimes of the character of that which was involved in the litigated issue.⁴

§ 1738. JUDGE MAY GIVE SUPPLEMENTARY CHARGE, BUT NOT IN ABSENCE OF DEFENDANT. Where the jury returned into court without having agreed, and the judge instructed them a second time on the evidence as to matters about which they had made no inquiries, and had stated no difficulties or doubts as to the law, this was held not a sufficient ground for a new trial,¹ though the case is different when the judge communicates his views of the law and facts in writing, without having the jury brought into open court for the purpose, and without procuring the attendance of the parties.²

§ 1739. ERRONEOUS INSTRUCTIONS ON ONE COUNT VITIATE WHEN THERE IS A GENERAL VERDICT. When there are two good counts in an indictment, and the court gives erroneous instructions to the jury as to one of the counts, and there is a general verdict against the defendants, and judgment thereon, a venire de novo will be awarded.¹

* As following great latitude in this respect, see: IND.—Albin v. State, 63 Ind. 599; Scott v. State, 64 Ind. 400. IOWA—State v. Reed, 49 Iowa 85. MICH.—People v. Arnold, 40 Mich. 716. TEX.—Phillips v. State, 6 Tex. App. 44; Hatch v. State, 8 Tex. App. 416, 34 Am. Rep. 751. FED.—Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244.

⁴ Johnson v. State, 59 Ga. 189.

See comments in Tweed's case, supra, § 1538.

A new trial will not be granted because the judge was the author of an account of a former trial of

the defendant, containing severe reflections on him, it appearing that such fact was not known in sufficient time to have influenced the jury in their deliberations.—Vance v. Com., 4 Va. (2 Va. Cas.) 162.

¹ Com. v. Snelling, 32 Mass. (15 Pick.) 321. Infra, § 1770.

² Infra, § 1770; supra, § 1843.

¹ State v. McCanless, 31 N. C. (9 Ired. L.) 375.

Material error in a charge vitiates even where not proved to have produced erroneous result. See Mitchell v. State, 60 Ala. 26.

2. *Mistake in the Admission or Rejection of Evidence.*

§ 1740. SUCH ERROR GROUND FOR NEW TRIAL. In any case where illegal testimony has been admitted, or legal testimony rejected, a new trial may be had,¹ if objection was duly taken at the trial.² In civil cases the practice is, that though there be exceptionable testimony, yet if there be sufficient legal evidence to support the verdict, and justice appears to have been done, the verdict will not be set aside,³ and the same rule applies where legal evidence has been excluded, but where, had it been admitted, it would have produced no variation in the result.⁴ In the former case, however, the court must see that the evidence did not weigh with the jury in forming their opinion, or that an opposite verdict, given upon the remainder of the evidence, would have been set aside as against evidence.⁵ And Denman, C. J., once observed to the coun-

¹ CAL.—*People v. Dayley*, 59 Cal. 600; *People v. McNutt*, 64 Cal. 116, 23 Pac. 64. MASS.—*Com. v. Green*, 17 Mass. 515; *Com. v. Edgerly*, 92 Mass. (10 Allen) 184. N. Y.—*People v. White*, 14 Wend. 111; *Carter v. People*, 2 Hill 317; *People v. Restell*, 3 Hill 289; *People v. McGee*, 1 Den. 21; *People v. Spooner*, 1 Den. 343, 43 Am. Dec. 672; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492. PA.—*Com. v. Parr*, 5 Watts & S. 345. TENN.—*Luttrell v. State*, 85 Tenn. 232, 4 Am. St. Rep. 760, 1 S. W. 886. TEX.—*Maines v. State*, 23 Tex. App. 468, 5 S. W. 123; *Montgomery v. State*, 23 Tex. App. 650, 5 S. W. 165.

² *Ibid.* CAL.—*People v. Ah Who*, 49 Cal. 32. FLA.—*Gallagher v. State*, 17 Fla. 370. GA.—*Evans v. State*, 33 Ga. 4; *Haiman v. State*, 39 Ga. 708. ILL.—*Adams v. People*, 109 Ill. 444, 50 Am. Rep. 617. MO.—*State v. Blare*, 69 Mo. 317. TENN.—*State v. Williams*, 50

Tenn. (3 Heisk.) 76. TEX.—*Williams v. State*, 4 Tex. App. 265.

See, also, *infra*, §§ 1743, 1818.

Material illegal evidence admitted, this can only be cured by the judge distinctly withdrawing the matter from the jury.—*Marx v. People*, 63 Barb. (N. Y.) 618. *Infra*, § 1742.

³ *Prince v. Shepherd*, 26 Mass. (9 Pick.) 176; *Stiles v. Tilford*, 10 Wend. (N. Y.) 338; *Doe v. Tyler*, 6 Bing. 561, 19 Eng. C. L. 255; *Horford v. Wilson*, 1 Taunt. 12.

⁴ *Fitch v. Chapman*, 10 Conn. 8; *Edwards v. Evans*, 3 East 451.

⁵ *Rutzen v. Farr*, 5 Nev. & M. 617.

Same principle: *State v. Struble*, 71 Iowa 11, 32 N. W. 1; *State v. McCahill*, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599; *People v. Greenwall*, 108 N. Y. 296, 2 Am. St. Rep. 415, 15 N. E. 404; *Somerville v. State*, 6 Tex. App. 433.

sel who had put in such inadmissible evidence: "It is not enough for you to say that the reception of this evidence could have made no difference; you should have taken care not to put in bad evidence. The alleged unimportance of a piece of evidence improperly rejected or admitted is no ground for refusing to send a case down for a new trial."⁶

§ 1741. USUALLY COURT WILL NOT PRESUME THAT ILLEGAL EVIDENCE HAD NO EFFECT. In criminal cases, however, courts will rarely presume that the particular evidence which was wrongfully admitted could, if material, have had no influence on the deliberations of the jury.¹ Where, however, the exceptant does not make it appear that he was, or might have been, prejudiced by the admission of the evidence excepted to, a new trial will not usually be granted.²

⁶ *Rutzen v. Farr*, 5 Nev. & M. 617, at p. 618.

¹ In England, however, by the present practice, if there is any illegal evidence admitted, the conviction is bad, notwithstanding there was enough legal evidence admitted to sustain the conviction. —*R. v. Gibson*, 18 Ad. & E. N. S. (18 Q. B.) 542, by all the judges, in which it was said by Sutton, J., that the last paragraph in the report in *R. v. Ball*, R. & R. 132, was introduced by the reporter without authority. The illegal evidence in this case was not at the time of its admission objected to by defendant's counsel.

² DAK.—*Territory v. Gay*, 2 Dak. 125, 2 N. W. 477. GA.—*Bird v. State*, 14 Ga. 43; *Mathis v. State*, 33 Ga. 24. ILL.—*Clark v. People*, 31 Ill. 479. IND.—*Powers v. State*, 87 Ind. 144. KAN.—*Wise v. State*, 2 Kan. 419, 85 Am. Dec. 595; *State v. Watson*, 30 Kan. 281, 1 Pac. 770.

MASS.—*Com. v. Bosworth*, 29 Mass. (22 Pick.) 397; *Com. v. Sumner*, 124 Mass. 321. MINN.—*State v. Spaulding*, 34 Minn. 361, 25 N. W. 793. MISS.—*Lynes v. State*, 36 Miss. 617; *Evans v. State*, 44 Miss. 762; *Ganard v. State*, 50 Miss. 147. MO.—*People v. Owens*, 79 Mo. 619. N. J.—*Hunter v. State*, 40 N. J. L. (11 Vr.) 495. N. Y.—*Stephens v. People*, 19 N. Y. 549; *People v. Gonzales*, 35 N. Y. 49; *Stephens v. People*, 4 Park. Cr. Rep. 396. OHIO.—*Tarbox v. State*, 38 Ohio St. 581. ORE.—*Jackson v. Sharff*, 1 Ore. 246. PA.—*Com. v. Eberle*, 3 Serg. & R. 14; *Com. v. Gallagher*, 4 Pa. Law Jour. 516, 2 Clark 297. TEX.—*Boon v. State*, 42 Tex. 237; *Evans v. State*, 13 Tex. App. 225. W. VA.—*State v. Yates*, 21 W. Va. 761; *State v. Kinney*, 26 W. Va. 141. FED.—*United States v. Jones*, 32 Fed. 569. ENG.—*R. v. Teal*, 11 East 307, 10 Rev. Rep. 516.

§ 1742. **WHEN ERRONEOUS RULING IS RESCINDED, NO GROUND FOR NEW TRIAL.** The illegal reception of evidence is no ground for revision when the evidence was subsequently ruled out, and the jury directed to disregard it.¹ So the converse is true, that a new trial will not be granted on account of the exclusion of particular evidence, when the objection to such evidence is withdrawn after its exclusion, and the defendant has had an opportunity to offer it.²

§ 1743. **OBJECTION, TO AVAIL, MUST HAVE BEEN MADE AT TIME.** Except under extraordinary circumstances of surprise,¹ a verdict will not be set aside because improper

Compare: *Com. v. McGowan*, 2 Pars. (Pa.) 347, where it is said that after a court has rejected competent and material testimony offered by a defendant charged with an infamous crime, the court will not refuse relief on the assumption that the rejected evidence would not have availed the accused, if it had been received. Per King, P. J.

To the same effect may be cited *DePhue v. State*, 44 Ala. 32; *Peck v. State*, 21 Tenn. (2 Humph.) 78; *Stokes v. State*, 63 Tenn. (4 Baxt.) 47; *State v. Turner*, 65 Tenn. (6 Baxt.) 201; *State v. Meader*, 54 Vt. 126, and *United States v. DeQuillfeldt*, 11 Boston Rep. 455, 2 Cr. Law Mag. 211, 214, where this is said to be the rule in Tennessee.

Compare: *Links v. State*, 81 Tenn. (13 Lea) 70.

Intoxication of witness, called for the defense, at the time so as to be incapable of comprehending the obligation of an oath, and the court refused to permit him to testify, but told the prisoner that he might recall him afterwards, but he was not so recalled, it was held

that this was not ground in law for granting a new trial, the granting or refusing a new trial in such case being in the discretion of the judge. — *State v. Underwood*, 28 N. C. (6 Ired. L.) 96. *Supra*, § 1502.

See *State v. Meader*, 54 Vt. 126, 651, where it was held that it must appear in such cases that no injury was wrought to the defendant.

A new trial was granted where proof of the violent temper of the prisoner, who was charged with homicide, was introduced by the government, where it had not been put in issue by him. — *State v. Merrill*, 13 N. C. (2 Dev. L.) 269.

¹ *State v. Lawrence*, 57 Me. 574; *Com. v. Johnson*, 137 Mass. 562; *Mimms v. State*, 16 Ohio St. 221; *Marx v. People*, 63 Barb. (N. Y.) 618.

Duty of the court so to direct: See *State v. Brantley*, 84 N. C. 766, and *supra*, § 1499.

² *People v. Henderson*, 28 Cal. 468; *Stephens v. People*, 19 N. Y. 549; *State v. McCurry*, 63 N. C. 33; *Hilliard on New Trials* (1873) 48.

¹ See, *supra*, § 1733; *infra*,

evidence was admitted, if no objection to its admission was made on trial.² And where a party neglects, at the proper time, to state for what purpose particular evidence is offered, and it is rejected for irrelevancy, he can not afterwards obtain a new trial by showing that it might have been applied to a point material to the issue.³ So when there is a special objection to the admission of testimony, which objection could be obviated if mentioned at the trial, a party can not keep such objection back at the trial, and then, when the mistake becomes one which it will be too late to remedy, use it in error under a general exception to the admissibility of such evidence.⁴ Nor can a party who waives objection to a deposition be admitted to subsequently object to its reception.⁵

A court, on its own motion, may refuse to admit evidence plainly irrelevant, though agreed to on both sides.⁶

3. *Verdict Against Law.*

§ 1744. JURY BOUND TO RECEIVE LAW FROM COURT. Whenever and as often as the finding of a jury is in point of law against the charge of the court, a due regard to public justice requires that the verdict should be set aside. On this principle, it is true, the doctrine of *autrefois acquit* grafts an important exception, but this excep-

§§ 1749, 1822; *Walker v. State*, 39 Ark. 221.

² ARK.—*Robinson v. State*, 33 Ark. 180. CAL.—*People v. Collins*, 48 Cal. 277; *People v. Ah Ton*, 53 Cal. 741. GA.—*Evans v. State*, 33 Ga. 4; *Halman v. Moses*, 39 Ga. 708. PA.—*Com. v. Sullivan*, 13 Phila. 410. TENN.—*State v. Williams*, 50 Tenn. (3 Helsk.) 376. TEX.—*Daffin v. State*, 11 Tex. App. 46.

See, also, *infra*, § 1819.

As to surprises, see, *infra*, § 1825.

Defendant may agree that the testimony of a witness for the

prosecution may be read in his absence. See *State v. Fooks*, 65 Iowa 196, 452, 21 N. W. 361, 773. See, also, *supra*, §§ 111, 1278, 1692.

³ *State v. Wadsworth*, 30 Conn. 56; *State v. Neville*, 51 N. C. (6 Jones L.) 423; *Barksdale v. Toomer*, 2 Bail. L. (S. C.) 180.

See, also, *supra*, §§ 1499 et seq.

⁴ *Bishop v. State*, 9 Ga. 121; *Height v. People*, 50 N. Y. 392; *supra*, §§ 1499 et seq.

⁵ *People v. Murray*, 52 Mich. 288, 17 N. W. 843; *Hancock v. State*, 14 Tex. App. 392.

⁶ *Durrett v. State*, 62 Ala. 434.

tion arises, not from the doctrine sometimes broached that the jury are the judges of law in criminal cases, but from the fundamental policy of the common law, which forbids a man when once acquitted to be put on a second trial for the same offense. When a case is on trial, the great weight of authority now is that the jury are to receive as binding the law laid down by the court; and after a conviction it is hardly doubted in any quarter that if the verdict be against instruction it will be set aside,¹ unless it should appear that the instruction in question was erroneous in law.²

§ 1745. — **EARLIER DOCTRINE IN THIS RESPECT TO THE CONTRARY.** For some time after the adoption of the federal Constitution, a contrary doctrine, it is true, was generally received. In many of the states, the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury in law as well as in fact of much political importance. Thus, John

¹ **ARK.** — Robinson v. State, 33 Ark. 180. **GA.** — Carter v. State, 48 Ga. 43. **KY.** — Montee v. Com., 26 Ky. (3 J. J. Marsh.) 150. **MASS.** — Com. v. Knapp, 27 Mass. (10 Pick.) 477, 20 Am. Dec. 534; Com. v. Porter, 51 Mass. (10 Metc.) 286; Com. v. Anthes, 71 Mass. (5 Gray) 185. **MO.** — Hardy v. State, 7 Mo. 607. **N. H.** — Pierce v. State, 13 N. H. 356. **N. Y.** — Duffy v. People, 26 N. Y. 589; People v. Sherlock, 166 N. Y. 180, 15 N. Y. Cr. Rep. 412, 59 N. E. 830, affirming 56 App. Div. 422, 15 N. Y. Cr. Rep. 297, 68 N. Y. Supp. 74; People v. Pine, 2 Barb. 571; Carpenter v. People, 8 Barb. 610. **PA.** — Guffy v. Com., 2 Grant 66. **VA.** — Davenport v. Com., 28 Va. (1 Leigh) 588. **FED.** — Sparf v. United States, 156 U. S. 51, 39 L. Ed. 343, 15 Sup. Ct. Rep. 273;

United States v. Shive, 1 Bald. 570, Fed. Cas. No. 16278; United States v. Battiste, 2 Sumn. 240, Fed. Cas. No. 14545.

In Tennessee it has been held that the jury in criminal causes are judges of the law as well as the facts, but it is the duty of the trial judge to explain the law to them. — McGowan v. State, 17 Tenn. (9 Yerg.) 184.

As to right of counsel to argue law to jury, see, *supra*, § 1514.

Momentary absence of the judge in an ante-room is not ground for new trial. — State v. Smith, 49 Conn. 376.

As to English practice, see R. v. Goas, London Law Times, Feb. 18, 1882.

² Loew v. State, 60 Wis. 559, 19 N. W. 437.

Adams, in his Diary for February 12, 1771,¹ in a passage which is probably either an extract from or memorandum of a speech before the colonial legislature, urges that in the then state of things public policy demanded that not only in criminal but in civil cases juries should be at liberty to take the law in their own hands. It was natural, therefore, that the early judges, both of the federal and state courts, should have continued for some time to assert a doctrine which, before the Revolution, they had found so necessary for protection against oppression and persecution. To this may be added that the federal Supreme Court in particular, for reasons elsewhere more fully given, was unwilling to assert any prerogative which might draw odium on itself, or expose the new Constitution to any additional shock.² Hence it was that Judge Chase not only broadly denied that the courts had any power to pronounce on the unconstitutionality of statutes, but over and over again declared that the Supreme Court was to be treated as possessed only of such powers as the legislature might from time to time impart to it. At the very time that this eminent but arbitrary judge was keeping the bar in an uproar by his assaults on counsel and witnesses, he was prompt in conceding to the jury as good a right to judge of the law as he had himself. Thus in Fries' Case he said, "The jury are to decide on the present and in all criminal cases both the law and the facts, on their consideration of the whole case." "If, on consideration of the whole matter, law as well as fact, you are convinced that the prisoner is guilty, etc., you will find him guilty." No better illustration of Judge Chase's character can be found than in the fact that, in the very case where he thus recognized the power of the jury over the law, he succeeded, by stopping counsel when they

¹ John Adams' Life and Works, 252.

judges to mix in politics, and its bad effects, see Wharton's State Trials, preliminary notes, 46-48.

² As to the tendency of the older

undertook to dispute the law he laid down, in raising a turmoil which ended in his own impeachment.³

§ 1746. — **EARLY CASES NO LONGER AUTHORITATIVE.** But it was not long before it was found necessary, if not entirely to abandon the rule, at least practically to ignore it. If juries have any moral right to construe the law, it becomes essential to know what is the construction they adopt; and the most strenuous advocates for the abstract doctrine soon confessed that the notions of juries, even on fundamental questions, vary so much that it was difficult to report, much more to systematize them. And yet, if it be settled that a jury's view of the law of a case is conclusive, it is vital to the community to know what that view is. Take, for instance, the statutory cheats growing out of the laws abolishing imprisonment for debt. The tendency of legislation in late years has been to relieve a debtor from imprisonment, except in cases where a wilful false pretense is the consideration for the debt, or where there has been a subsequent fraudulent disposal of the acquired property. The tendency of judicial decision is to construe these exceptions strictly, and to hold that, to entitle a creditor to avail himself of them, he must show that he had not the opportunity of detecting the false pretense at the time, that it related to an alleged existing fact, or that the property secreted was actually and fraudulently detached from an honest and vigilant

³ Judge Chase was not peculiar in his views, appears from the testimony taken during his impeachment. Thus, Mr. Edward Tilghman, a lawyer not only of great eminence, but of political sympathies which would have kept him from any ultra democratic tendencies, testified: "The court generally hear the counsel at large on the law, and they are permitted to ad-

dress the jury on the law and on the fact, after which the counsel for the state concludes; the court then states the evidence to the jury, and their opinion of the law, but leaves the decision of both law and fact to the jury."—Chase's Trial 143. See, *supra*, § 1514.

To the same effect, also, is Mr. Hay's evidence as to the state of practice at the time in Virginia.—Chase's Trial 175.

execution. These views are well known to the community; they enter into every contract, and are binding upon the courts. But what would a jury say? At one time a broken promise would be held indictable, and thus the old days of imprisonment for debt would be recalled. At another time not even frauds clearly within the statute would be held indictable, and hence imprisonment for fraud would cease in toto. Or take, as another illustration, malicious mischief at common law, about which even among the courts there is already sufficient diversity of opinion. Certainly from juries, no settled rule could be had as to what the offense is, and if there could be, no one could undertake to classify their decisions. Or again, when the question arises whether the uncorroborated evidence of an accomplice is enough to convict in a particular case, a question in which the judiciary of almost each state holds a distinct shade of opinion, where would be the chances of uniformity of adjudication, if juries, acting on the particular circumstances at hand, are to be the arbiters?

§ 1747. — PRACTICAL ILLUSTRATION OF DOCTRINE. But a practical illustration of such point is found in a case to which may be attributed the change of sentiment on this question of the late Mr. Justice Baldwin, a judge who, it is well known, was not disposed on light grounds to surrender any long-cherished opinions. On several occasions, in his early judicial history, he was unequivocal in his commitment of the whole law to the jury; and in one instance, after counsel had directly appealed from the court to the jury on a legal point, he went so far as to say that, in so doing, they had but “acted in the strict line of their duty.”¹ But when, some time afterwards, counsel, profiting by this encouragement, undertook to open to the jury, on an indictment for counterfeiting United States bank notes, the unconstitutionality of the

¹ *United States v. Wilson*, 1 Bald. 78, Fed. Cas. No. 16730.

bank's charter, this learned judge paused. He felt that however legitimate a result of his own reasoning this course was, if permitted, it would defeat all prosecutions for the particular offense on trial. "Should you assume and exercise this power," he said, in language which applies with equal force to all questions of law whatever, "your opinion does not become a supreme law, no one is bound by it, other juries will decide for themselves, and you could not expect that courts would look to your verdict for the construction of the Constitution, as to the acts of the legislative or judicial departments of the government; nor that you have the power of declaring what the law is, what acts are criminal, what are innocent, as a rule of action for your fellow-citizens or for the court. If one jury exercises this power, we are without a constitution or laws. One jury has the same power as another; you can not bind those who may take your places; what you declare constitutional today, another jury may declare unconstitutional tomorrow. We shall cease to have a government of law, when what is the law depends on the arbitrary and fluctuating opinions of judges and jurors, instead of the standard of the Constitution, expounded by the tribunal to which has been referred all cases arising under the Constitution, laws, and treaties of the United States."²

§ 1748. — PRACTICE REPUDIATED. But in practice, however speciously the doctrine may be asserted, it is, except so far as it may sometimes lead a jury to acquit

² Supra, § 1509; *United States v. Shive*, 1 Bald. 510, Fed. Cas. No. 16278.

To same effect may be cited *United States v. Riley*, 5 Blatch. 204, Fed. Cas. No. 16164; *United States v. Greathouse*, 4 Sawy. 457, Fed. Cas. No. 15254.

Compare: 2 *Curtis' Life and Works* 176.

The question in the text I have examined in greater detail in an article in the *Southern Law Review* for August-September, 1879, reprinted in 1 *Crim. Law Mag.* 51 et seq.

An essay, on the same topic, by Chief Justice Wade, of Montana, will be found in 3 *Crim. Law Mag.* 484.

in a case where the facts demand a conviction, practically repudiated, and since its only operation now is mischievous, it is time it should be rejected in theory as well as reality. For, independently of the reasons already mentioned, an attempt to carry it out in practice would involve a trial in endless absurdity. Thus, for instance, what questions of law are of more vital interest to a prisoner on trial than those of the admissibility of dying declarations, or of confessions? If the jury are to judge of the law, what grosser invasions of their rights, and those of the prisoner could be, than to take from the jury the decision of questions thus distinctly within their province, and which, so far from being collateral to, as has been urged, are in most instances direct to, the matter of guilt? And yet there is no judge sitting with a jury on the trial of a criminal case, who does not take to himself alone the hearing of the preliminary evidence as to whether the declarations were uttered under a consciousness of approaching dissolution, or whether the confession was extorted by duress or solicitation. The line of authority here and in England is unbroken, that in such and in kindred cases the court alone is to determine.¹ But if such be the law, as a matter of principle the jury have no more moral right to convict or acquit a man against the charge of the court that such evidence was to be stricken out, if improvidently let in, than they would to convict or acquit him on the evidence if actually excluded. And this view is strengthened by the fact, that in England and this country the statutory or constitutional provisions giving juries the power of determining as to whether a written document is unlawful or not go no further than the particular instance of indictment for libel.

§ 1749. JURY ARE, AT COMMON LAW, NOT JUDGES OF LAW. The conclusion we must therefore accept is that the jury are no more the judges of law in criminal than in civil

¹ See Whart. Crim. Ev. (Hilton's ed.), §§ 297, 523 et seq.

cases, with the qualification that, owing to the peculiar doctrine of *autrefois acquit*, a criminal acquittal can not be overhauled by the court.¹ In the federal courts such is now the established rule.²

¹ As to law of *autrefois acquit*, see, *supra*, §§ 1364 et seq.

² *United States v. Riley*, 5 Blatchf. 204, Fed. Cas. No. 16164; *United States v. Fenwick*, 4 Cr. 675, Fed. Cas. No. 15086; *Stettinius v. United States*, 5 Cr. 573, Fed. Cas. No. 13387; *United States v. Morris*, 1 Curt. 23, Fed. Cas. No. 15815; *United States v. Battiste*, 2 Sumn. 240, Fed. Cas. No. 14545; *United States v. Greathouse*, 4 Sawy. 457, 2 Abb. U. S. 364, Fed. Cas. No. 15254; *United States v. Keller*, 19 Fed. 633.

See, to the same effect, 2 Curtis' *Life and Works* 176.

To the same effect is the reply of the late Judge Thompson, while presiding in the United States Circuit Court, in the city of New York, on the trial of a criminal case, when requested by one of the counsel to charge the jury that they were judges both of the law and the fact. His answer was: "I sha'n't; they ain't."

Equally emphatic was the direction of Mr. Justice Hunt, on the trial of Miss Anthony, in 1873.—*United States v. Anthony*, 11 Blatchf. 200, Fed. Cas. No. 14459. See, *infra*, § 1751.

On this principle can be sustained the action of Judge Curtis, and that of Judge Grier and Judge Kane, in Philadelphia, in prosecutions where they held that it was a good cause of challenge that a jurymen differed from the court in his view of the constitutionality of the statute on which the prose-

cution rested. Certainly, if the jury were the judges of the law, this would have been as arbitrary an act as was that of James II, who polled the Court of King's Bench as to the dispensing power, and dismissed the judges who refused beforehand to pledge themselves to hold the prerogative constitutional. On the assumption that the jury are judges of the law as well as the court, there is no more reason, *a priori*, that the court should set aside a juror, than that the jury should set aside the judge. See, *supra*, § 1602.

"It is the duty of the court," said Chief Justice Shaw, of Massachusetts, in 1845, "to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions pertinent to the issue, upon which either party may request the direction of the court upon matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide, contrary to such opinion or direction of the court in matter of law. To this duty jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent, and in the same manner, as they are conscientiously bound to de-

Independently of the federal courts, which have been

cide on all questions of fact according to the evidence." See *Com. v. Anthes*, 71 Mass. (5 Gray) 185.

It seems, however, that the same court will not prevent counsel addressing the jury on the law.—*Com. v. Porter*, 51 Mass. (10 Metc.) 286; see *Com. v. White*, 51 Mass. (10 Metc.) 14.

In Massachusetts the following statute was subsequently passed: "In all trials for criminal offenses, it shall be the duty of the jury to try, according to established forms and principles of law, all causes which shall be committed to them, and after having received the instructions of the court, to decide at their discretion, by a general verdict, both the fact and the law involved in the issue, or to find a special verdict at their election; but it shall be the duty of the court to superintend the course of the trials, to decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon all collateral and incidental proceedings, and also to charge the jury, and to allow bills of exception; and the court may grant a new trial in cases of conviction."—*Supplement to Rev. Stat. 1855*, ch. 153; *Com. v. Anthes*, 71 Mass. (5 Gray) 185, *Dewey and Thomas, JJ.*, dissenting. See *Com. v. Rock*, 76 Mass. (10 Gray) 4.

Under this act it was held that the jury have no rightful power to determine questions of law involved in the issue against the instructions of the court.

It was also held that the legislature can not, consistently with the Constitution of the Commonwealth,

confer on the jury, in criminal trials, the rightful power to determine questions of law involved in the issue, against the instructions of the court, even by a statute which also provides that the jury shall try the cases according to established forms and principles of law, and that the court shall superintend the course of the trials, decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon collateral and incidental proceedings, and charge the jury, and allow bills of exception, and may grant a new trial in cases of conviction. By *Shaw, C. J., Metcalf, Bigelow, and Merrick, JJ.*; contra, *Dewey and Thomas, JJ.*—*Com. v. Anthes*, 71 Mass. (5 Gray) 185. Same principle in *Com. v. Rock*, 76 Mass. (10 Gray) 4.

It has also been ruled that a refusal of the presiding judge to allow the defendant's counsel in a criminal case to read to the jury the whole of the statute, upon one section of which the prosecution is founded, is no ground of exception, if he is allowed to read all those parts which he contends affect the construction of that section, and to comment to the jury upon the whole of the statute.—*Com. v. Austin*, 73 Mass. (7 Gray) 51.

In Connecticut, a statute making juries judges of the law does not relieve them, it is said, from the duty of obeying the law as it actually is.—*State v. Buckley*, 40 Conn. 246.

In *State v. Thomas*, 47 Conn. 546, 36 Am. Rep. 98, it was held that it was not error for the court

already noticed, it may now be considered that the courts

to tell the jury that it was absurd for them to hold an act unconstitutional which had been sustained by the court.

In New York, though before the recent Constitution the inclination was otherwise, the same view has been solemnly held in more than one case of recent date.—*Duffy v. People*, 26 N. Y. 588; *Bennett v. People*, 49 N. Y. 141, cited, *infra*, § 1751; *People v. Pine*, 2 Barb. (N. Y.) 566; *Carpenter v. People*, 8 Barb. (N. Y.) 610.

Compare: *People v. Finnegan*, 1 Park. Cr. Rep. (N. Y.) 147; *People v. Finnegan*, 1 Park. Cr. Rep. (N. Y.) 453; *People v. Finnegan*, 26 How. Pr. (N. Y.) 195.

Contra: *People v. Thayers*, 26 How. Pr. (N. Y.) 595; *People v. Videto*, 26 How. Pr. (N. Y.) 603.

In Pennsylvania, though till 1879 there was no reported decision on the express point from the Supreme Court in banc, it has not been usual to leave to the jury the law to decide. A very strong leaning to the contrary is shown by *Gibson, C. J.*, in closing a charge in a capital case: "If the evidence on these points fall the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it."—*Com. v. Harman*, 4 Pa. St. 269.

The same position was taken by *Rogers, J.*, in *Com. v. Sherry*, reported in Appendix to Wharton on Homicide, 2d ed.

Not varying much from this is the language of *Sergeant, J.*, in a charge in a case of misdemeanor: "The point, if you believe the evidence on both sides, is one of law, on which it is your duty to receive

the instructions of the court. If you believe the evidence in the whole case, you must find the defendant guilty."—*Com. v. Vansickle, Brightly R.* (Pa.) 73. *Infra*, § 1751.

In *Kane v. Com.*, 89 Pa. St. 522, 33 Am. Rep. 787, however, Mr. Chief Justice Sharswood, speaking for the court, declared it error for a judge to say to the jury, "The law is for the court, and you will be governed by it, or you will not, as you have sworn to do, try the case by the law and by the evidence." "The distinction," says Chief Justice Sharswood, "between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. No court should give a binding instruction to a jury, which they are powerless to enforce, by granting a new trial if it should be disregarded. They may present to them the obvious considerations which should induce them to receive and follow their instructions, but beyond this they have no right to go. The argument in favor of their taking the law from the court is addressed, very properly, *ad verecundiam*. The court is appointed to instruct them, and their opinion is the best evidence of what the law is."

For a discussion of this opinion, see *South. Law Jour.* for 1879, pp. 352 et seq.; 1 *Crim. Law Mag.* 47.

—This is greatly modified in the subsequent case of *Com. v. Nicholson*, 96 Pa. St. 503, where the Supreme Court say: "The court below had an undoubted right to

of Maine,³ New Hampshire,⁴ Massachusetts,⁵ Rhode

instruct the jury as to the law, and to warn them, as they did, against finding contrary to it. This is very different from telling them that they must find the defendant guilty, which is what is meant by a binding instruction in a criminal case." This may be considered as virtually recalling the points in which the opinion on *Kane v. Com.* differs from prior opinions in the same court. See *Johnston v. Com.*, 85 Pa. St. 54, 27 Am. Rep. 622, cited *supra*, § 798; 1 Crim. Law Mag. 242.

This may be considered as recalling the point on which *Kane v. Com.*, *supra*, differs from prior opinions of the same court. See *Johnston v. Com.*, 85 Pa. St. 54, 27 Am. Rep. 622, cited, *supra*, § 1736; 1 Crim. Law Mag. 242.

In Virginia, not only is it held that the jury has no right to take the law except from the court, but it has been ruled expressly, that counsel will not be permitted to address an argument on the law except to the court.—*Davenport v. Com.*, 28 Va. (1 Leigh) 588; *Com. v. Grath*, 30 Va. (3 Leigh) 761; *Howell v. Com.*, 46 Va. (5 Gratt.) 664.

On these decisions, see a learned article in 6 Am. Jurist 237; and see, fully, *supra*, §§ 1509 et seq.

³ In *State v. Wright*, 53 Me. 336, Appleton, C. J., in the course of his opinion, said: "The question seems never to have been directly before the Supreme Court of the United States sitting in banc; but several of the judges of that court, namely, Baldwin, Thompson, Story, and Curtis, as we have already seen, have emphatically denied the

right of the jury to decide the law in any case, civil or criminal; and we can not doubt that such will be the decision of the full court if the question ever comes before them.

"The following states unite in the doctrine that it is the duty of the jury to be governed by the law as it is laid down by the court," citing: ALA.—*Pierson v. State*, 12 Ala. 153; *Batre v. State*, 18 Ala. 119. ARK.—*Pleasant v. State*, 13 Ark. (8 Eng.) 360. KY.—*Montee v. Com.*, 26 Ky. (3 J. J. Marsh.) 150; *Com. v. Van Tuyl*, 58 Ky. (1 Metc.) 1, 71 Am. Dec. 455. MASS.—*Com. v. Porter*, 51 Mass. (10 Met.) 263; *Com. v. Anthes*, 71 Mass. (5 Gray) 185. MISS.—*Williams v. State*, 32 Miss. 389. MO.—*Hardy v. State*, 7 Mo. 607. N. H.—*Pierce v. State*, 13 N. H. 536. N. Y.—*Duffy v. People*, 26 N. Y. 588; *People v. Pine*, 2 Barb. 566; *Carpenter v. People*, 8 Barb. 610; *Stafford v. People*, 1 Park. Cr. Rep. 474. N. C.—*State v. Peace*, 46 N. C. (1 Jones L.) 251. OHIO.—*Montgomery v. State*, 11 Ohio 424; *Robbins v. State*, 8 Ohio St. 131. PA.—*Penn. v. Bell*, 1 Add. 160. R. I.—*Dorr's Trial*, 121. TENN.—*McGowan v. State*, 17 Tenn. (9 Yerg.) 184. TEX.—*Nels v. State*, 2 Tex. 280. VA.—*Davenport v. Com.*, 28 Va. (1 Leigh) 588;

⁴ *Pierce v. State*, 13 N. H. 536.

⁵ *Com. v. Porter*, 51 Mass. (10 Met.) 286; *Com. v. White*, 51 Mass. (10 Met.) 14; *Com. v. Abbott*, 54 Mass. (13 Met.) 120, though now modified by statute given in a prior note to this section.

Island,⁶ New York,⁷ Virginia,⁸ North Carolina,⁹ Ohio,¹⁰ Kentucky,¹¹ Michigan,¹² Alabama,¹³ Mississippi,¹⁴ Mis-

Com. v. Grath, 30 Va. (3 Leigh) 761; Howel v. Com., 46 Va. (5 Gratt.) 664.

In Indiana the decisions are influenced by local legislation, and are therefore unimportant. There are, however, two well-considered decisions in that state in which the right of the jury to determine the law is denied.—Townsend v. State, 2 Blackf. (Ind.) 150, 156; Carter v. State, 2 Ind. 617.

Contra: Warren v. State, 4 Blackf. (Ind.) 150; Armstrong v. State, 4 Blackf. (Ind.) 247; Williams v. State, 10 Ind. 503.

In State v. Holden, 5 Ga. 441, and some other cases in that state (Georgia) have been supposed by some to be in favor of the doctrine. But this is an error. In that state the subject is regulated by express statutory law, and their decisions have no bearing upon the question as a common law right.

In Vermont, in State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90, a majority of the court held that, in criminal cases, the jury are judges of the law as well as the facts, but the doctrine was resisted in a very able dissenting opinion by Judge Bennett; and in a later case (State v. McDonnell, 32 Vt. 523), the presiding judge declared to the jury that to him such a doctrine was "most absurd and nonsensical," and the full court held the remark unexceptionable.

In Maine, in State v. Snow, 18 Me. 346, the court seems to have

taken it for granted that the law was settled in favor of the right of the jury to determine the law in criminal cases, and gave the question apparently very little consideration. Two cases only are cited. One of them (Crosswell's Case, 3 John. Cas. (N. Y.) 337) establishes no such doctrine; and the other (Com. v. Knapp, 27 Mass., 10 Pick., 477, 497, 20 Am. Dec. 534) has been emphatically overruled by the same court which made the decision.

⁶ Dorr's Trial 121; 7 Bost. L. R. 347.

⁷ See cases given above.

⁸ Howel v. Com., 46 Va. (5 Gratt.) 664, and cases cited supra.

⁹ State v. Peace, 46 N. C. (1 Jones L.) 251.

¹⁰ Montgomery v. State, 11 Ohio 424; Robbins v. State, 8 Ohio St. 131; Adams v. State, 29 Ohio St. 412.

¹¹ Montee v. Com., 26 Ky. (3 J. J. Marsh.) 150; Com. v. Van Tuyl, 58 Ky. (1 Metc.) 1, 71 Am. Dec. 455.

¹² People v. Mortimer, 48 Mich. 37, 11 N. W. 776.

¹³ Pierson v. State, 12 Ala. 153; Batre v. State, 18 Ala. 119, reviewing State v. Jones, 5 Ala. 666; Washington v. State, 63 Ala. 135, 35 Am. Rep. 8; Sullivan v. State, 66 Ala. 48; Tidwell v. State, 70 Ala. 33; Amos v. State, 73 Ala. 498.

¹⁴ Cothran v. State, 39 Mass. 541; Bangs v. State, 61 Miss. 363.

souri,¹⁵ Arkansas,¹⁶ California,¹⁷ Nebraska,¹⁸ South Carolina,¹⁹ and Texas,²⁰ unite in the doctrine that the jury must take the law from the court; while the right of the jury to determine the law seems in some sense to be held, under the stress of constitutional or legislative provisions, in Vermont,²¹ Tennessee,²² Georgia,²³ Maryland,²⁴ Loui-

¹⁵ *Hardy v. State*, 7 Mo. 607. See *State v. Jones*, 64 Mo. 391.

¹⁶ *Pleasants v. State*, 13 Ark. 360.

By the Constitution, however, the jury are judges of the law.— See *Patterson v. State*, 7 Ark. (2 Eng.) 59, 44 Am. Dec. 530.

In *Sweeney v. State*, 35 Ark. 585, it was held that it was the duty of the court to declare the law and of the jury to apply it; and see *Robinson v. State*, 33 Ark. 180.

¹⁷ *People v. Stewart*, 7 Cal. 140; *People v. Anderson*, 44 Cal. 65.

¹⁸ *Parrish v. State*, 14 Neb. 60, 15 N. W. 357.

¹⁹ *State v. Drawdy*, 14 Rich. L. (S. C.) 87.

²⁰ *Nels v. State*, 2 Tex. 280; *Pharr v. State*, 7 Tex. App. 472.

²¹ *State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90; but see *State v. McDonnell*, 32 Vt. 523.

The adhesion of the Vermont courts to the doctrine is by no means hearty. Thus, in a case decided in 1884, we have the following: "It does not follow that because the jury are judges of the law counsel can read what they please to them. The rule that the jurors are judges of the law does not affect the course or order of procedure of the trial in the least; it is the result of the power of the jury rather than of any inherent right, and the trial should be conducted in the usual course of proceedings," citing *State v. McDonnell*, 32 Vt. 491. "My own impres-

sion is that counsel are not at liberty to insist to the jury that the law is different from that given by the court; as well might they argue to them the questions of the admission or rejection of evidence and many other legal ones arising on the trial; and this view is not at all inconsistent with the fact that, by the power of the jury to render a general verdict, they virtually become judges of the law."— *State v. Hopkins*, 56 Vt. 263. See, however, *State v. Meyer*, 58 Vt. 457, 3 Atl. 195.

²² *Nelson v. State*, 32 Tenn. (2 Swan) 237. See, however, *Harris v. State*, 75 Tenn. (7 Lea) 538.

In *Hannah v. State*, 79 Tenn. (11 Lea) 201, it was held that the court ought not to refuse to permit counsel to argue the law to the jury.

²³ *Holden v. State*, 5 Ga. 441; *Ricks v. State*, 16 Ga. 600; *McGuffie v. State*, 17 Ga. 497; *McPherson v. State*, 22 Ga. 478; *McDaniel v. State*, 30 Ga. 853; *Clarke v. State*, 35 Ga. 75; *O'Neil v. State*, 48 Ga. 66; *McMath v. State*, 55 Ga. 303.

Duty to take law from court.— *Habersham v. State*, 56 Ga. 61; *Powell v. State*, 65 Ga. 707, and *Robinson v. State*, 66 Ga. 517; *Mahone v. State*, 66 Ga. 539; *Ridenhour v. State*, 75 Ga. 382; *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480.

²⁴ *Franklin v. State*, 12 Md. 236; *Forwood v. State*, 49 Md. 531.

siana,²⁵ Illinois,²⁶ and Indiana.²⁷ So far as concerns the question immediately in discussion, it is not disputed that if a jury, whatever may be its supposed elementary rights, finds against the court's charge, the verdict should be set aside, and a new trial granted, unless it be made to appear that the verdict would not have been sustained if in accordance with the charge of the court.²⁸

This was in obedience to a constitutional provision that the jury are to be judges of the law. But at the same time it was held that, on the question of the constitutionality of laws, the jury were to take the law from the court.—See *Wheeler v. State*, 42 Md. 563.

In *Bell v. State*, 57 Md. 108, it was held that the court "has the right to instruct the jury in a criminal case as to the legal effect of the evidence," and having such right it has the right to prevent counsel from arguing against such an instruction.

²⁵ *State v. Jurche*, 17 La. Ann. 71; *State v. Saliba*, 18 La. Ann. 35; *State v. Ford*, 37 La. Ann. 444.

In subsequent cases, however, this is qualified by declaring that though the jury have the power, they have not the moral right to reject the law of the court.—*State v. Tally*, 23 La. Ann. 677; *State v. Ford*, 37 La. Ann. 449.

²⁶ *Falk v. People*, 42 Ill. 331.

See, however, *Mullnix v. People*, 76 Ill. 211, in which the defendant asked the court below to charge the jury that they were "sole judges of the law." The court, however, told the jury that it was "their duty to accept and act upon the law, as laid down to you by the court, unless you can say, upon your oaths, that you are bet-

ter judges of the law than the court." The Supreme Court held that this was eminently proper.

To the same effect, see *Davidson v. People*, 90 Ill. 221.

²⁷ Required by the state constitution.—*Warren v. State*, 4 Blackf. (Ind.) 150; *Williams v. State*, 10 Ind. 503; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

See, also, 5 Law Rep. (N. S.) 6; *Clem v. State*, 31 Ind. 480; *McCarthy v. State*, 56 Ind. 203; and *Fowler v. State*, 85 Ind. 538, where it was held that under the bill of rights the jury were not bound by even the decisions of the Supreme Court.

In this state counsel can argue the law at large to the jury.—*Stout v. State*, 96 Ind. 407.

²⁸ As to Indiana, see *Dally v. State*, 10 Ind. 536; *Thetge v. State*, 83 Ind. 126. See, *supra*, § 1484.

In applying the constitutional provision of this state that the jury are to determine the law, the Supreme Court has held that instructions from the court on the law are only advisory and do not bind (*Powers v. State*, 87 Ind. 144; *Nuzum v. State*, 88 Ind. 599); though if erroneous there will be a reversal.—*Clem v. State*, 42 Ind. 447. See *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171; 5 Crim. Law Mag. 524, and note.

§ 1750. COURT BOUND TO HEAR COUNSEL AS TO LAW. It has been ruled in Virginia, that upon a question of law addressed to the court at nisi prius, the judge is not bound to hear an argument from the prisoner's counsel, if his opinion is already formed.¹ The same point was made in Fries' Case by Judge Chase. But in the latter case the ruling of the court in this respect was the subject of an impeachment in which a conviction was barely escaped.² The proper view is that on all questions of law, the court, before decision, is bound to hear counsel, with proper limits as to time. But after argument has been heard and the point decided, counsel can not, ordinarily, be permitted to appeal from court to jury on the law.³

§ 1751. COURT MAY DIRECT ACQUITTAL OR CONVICTION. Can a judge direct a jury peremptorily to acquit or convict, if in his opinion this is required by the evidence? Unless there is a conflicting statutory provision this is within the province of the court, supposing that there is no disputed fact on which it is essential for the jury to pass.¹ A remarkable illustration of a conviction thus directed has been already noticed.² Where the whole case,

¹ See *Amos v. State*, 73 Ala. 498; *Howel v. Com.*, 46 Va. (5 Gratt.) 664.

² *Supra*, §§ 1495, 1538, 1737.

³ *Dejarnette v. Com.*, 75 Va. 867.

¹ ALA.—*Perkins v. State*, 50 Ala. 154. GA.—*Tucker v. State*, 57 Ga. 503. IND.—*Nuzum v. State*, 88 Ind. 599; *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171, 5 Crim. Law Mag. 524. N. C.—*State v. Dixon*, 75 N. C. 275. PA.—*Gerbracht v. Com.*, 1 Pennyp. 471; *Com. v. Magee*, 10 Phila. 201. TEX.—*Lunsford v. State*, 9 Tex. App. 217.

Contra: *United States v. Taylor*, 3 McC. 500, 11 Fed. 470; 3 Crim. Law Mag. 552.

In *Amos v. State*, 73 Ala. 498, a direction to convict was held justifiable only in very strong cases.

² *United States v. Anthony*, 11 Blatchf. 200, Fed. Cas. No. 14459, by Hunt, J., 1873. See 1 Kerr's Whart. Crim. Law, §§ 108-113.

In *Hopt v. Utah*, 110 U. S. 574, 28 L. Ed. 262, 4 Sup. Ct. 202, it was held that where a statute leaves it to the jury to determine the degree, it is error for the court to charge that the offense is murder in the first degree. And so by other courts.—See *Diesbach v. State*, 38 Ohio St. 369; *Abernethy v. State*, 101 Pa. St. 322, affirming *Pauli v. Com.*, 89 Pa. St. 432.

leaving out disputed facts, requires an acquittal, a direction to acquit is not only proper, but right;³ and there are instances of unfounded prosecutions pressed by popular prejudice when such a course is the peremptory duty of the judge.⁴ Where a demurrer to evidence is allowed, the opinion of the court to this effect may be compelled by the defendant by filing such a demurrer.⁵ And even where the rule is that the court can not direct a verdict, a palpable mistake in a verdict may be remitted to the jury for correction.⁶

4. *Verdict Against Evidence.*

§ 1752. VERDICT AGAINST EVIDENCE MAY BE SET ASIDE. A conviction contrary to the weight of evidence will be set aside when any of the essential allegations of the indictment remain unproved.¹ Thus, where the defendant was

³ In *State v. Irvin*, 19 Fla. 672, a direction that if certain facts were true the case was murder in the first degree was sustained.—*State v. Brown*, 16 Kan. 475; *State v. Gustave*, 27 La. Ann. 395.

⁴ See *Com. v. Fitchburg R. Co.*, 92 Mass. (10 Allen) 189; *State v. Jaeger*, 66 Mo. 208.

Judge has not this right is intimated in *Howell v. People*, 5 Huh (N. Y.) 620, 2 Cow. Cr. Rep. 433; affirmed 69 N. Y. 607.

"It has been a disputed question whether the court has power to direct an acquittal, or whether its power is advisory merely, which might or might not be acquiesced in by the prosecuting attorney or by the jury. Practically the result is the same. It is very rare that the prosecuting officer will not accede to the opinion of the court, and still more rare to convict against the advice of the court that it would be improper." . . .

"I can see no reason, therefore, why the court may not, in a case presenting a question of law only, instruct the jury to acquit the prisoner, or to direct an acquittal and enforce the direction; nor why it is not the duty of the court to do so."—Church, C. J., in *People v. Bennett*, 49 N. Y. 141, Cow. Cr. Rep. 482. See, also, *People v. Harris*, 1 Edm. Sel. Cas. (N. Y.) 453.

A charge that if the jury believe the witnesses the case is one of manslaughter is not erroneous.—*State v. Vines*, 93 N. C. 493, 53 Am. Rep. 466.

A bald direction to convict is error.—*State v. Dixon*, 75 N. C. 275.

⁵ *Supra*, §§ 1333, 1641.

⁶ *State v. Gilkie*, 35 La. Ann. 53; *State v. White*, 35 La. Ann. 96.

¹ CONN.—*State v. Lyon*, 12 Conn. 487. FLA.—*Newborn v. State*, 75 So. 581. GA.—*Shaw v. State*, 114 Ga. 448, 40 S. E. 242;

charged with burning the shop of B. & C., and no evidence was offered as to ownership;² where the evidence on a charge of passing an altered note failed to show that the prisoner knew of the alteration at the time of the passing;³ where there was a variance on any material incident of the offense;⁴ where, on a charge of receiving stolen goods, no evidence existed as to the scienter;⁵ where, on the same charge, the indictment averred a former con-

Hunnicut v. State, 114 Ga. 448, 40 S. E. 243; Henderson v. State, 92 S. E. 871. ILL.—Falk v. People, 42 Ill. 331; Dunn v. People, 109 Ill. 635. IND.—Bruce v. State, 87 Ind. 450. MASS.—Com. v. Braggs, 22 Mass. (5 Pick.) 429. MICH.—People v. Henssler, 48 Mich. 49, 11 N. W. 804; People v. Parkhurst, 49 Mich. 22, 12 N. W. 894; People v. Kohler, 49 Mich. 324, 13 N. W. 608; People v. Howard, 50 Mich. 239, 15 N. W. 101. MO.—State v. Bird, 1 Mo. 417; State v. Hopper, 71 Mo. 425; State v. Prendebale, 165 Mo. 329, 65 S. W. 559. NEV.—State v. Ah Kung, 17 Nev. 361, 30 Pac. 995. N. C.—State v. Atkinson, 93 N. C. 519; State v. Ellsworth, 131 N. C. 773, 92 Am. St. Rep. 790, 42 S. E. 699; State v. Martin, 141 N. C. 832, 53 S. E. 874. S. C.—State v. Anderson, 2 Ball. L. 565; State v. Fisher, 2 Nott. & McC. 261; State v. Clardy, 73 S. C. 340, 53 S. E. 493. TENN.—Bedford v. State, 24 Tenn. (5 Humph.) 553. TEX.—King v. State, 4 Tex. App. 256; Satterwhite v. State, 6 Tex. App. 609; Ellis v. State, 10 Tex. App. 540; Adams v. State, 10 Tex. App. 777; Pogue v. State, 12 Tex. App. 283; Pease v. State, 13 Tex. App. 18; Hardin v. State, 13 Tex. App. 192; Walker v. State, 14 Tex. App.

509. VA.—Ball v. Com., 49 Va. (8 Leigh) 726. WIS.—Ohms v. State, 49 Wis. 415, 5 N. W. 827; State v. Leppere, 66 Wis. 355, 23 N. W. 376. FED.—Resp. v. Lacaze, 2 U. S. (2 Dall.) 118, 1 L. Ed. 313; United States v. Duval, Gil. 356, Fed. Cas. No. 15015.

Discretion of court in granting a new trial on ground verdict is not supported by the evidence or on the ground of the insufficiency of the evidence.—Harmon v. State, 111 Ga. 829, 35 S. E. 654; State v. Hayes, 69 S. C. 295, 48 S. E. 251; Sackow v. State, 122 Wis. 156, 99 N. W. 440.

Verdict not plainly wrong motion to set same aside and grant a new trial on the ground that it is contrary to the evidence, or not supported by the evidence, must be denied.—Pryor v. Com., 68 Va. (27 Gratt.) 1009; Whitehurst v. Com., 79 Va. 556; Finchim v. Com., 83 Va. 689, 3 S. E. 343; State v. Smith, 24 W. Va. 814; State v. Maier, 30 W. Va. 757, 15 S. E. 991.

² State v. Lyon, 12 Conn. 487.

³ State v. Anderson, 2 Ball. (S. C.) 565.

⁴ State v. Bird, 1 Mo. 417; State v. Hamilton, 17 S. C. 462.

⁵ Bedford v. State, 24 Tenn. (5 Humph.) 553.

viction for the same offense, but no proof was offered on trial to prove the identity of the defendant with the former defendant;⁶ where the corpus delicti was not proved;⁷ in each of these cases a conviction was set aside on account of the insufficiency of the testimony to support the verdict. If, however, there was conflicting evidence, and the question of fact was left fairly and fully to the jury, the verdict will generally be permitted to stand,⁸ even though the judges may not be able to say that they would have agreed personally to the verdict had the question been left to their exclusive determination.⁹ Nor will a

⁶ *Com. v. Briggs*, 22 Mass. (5 Pick.) 429.

⁷ *State v. Hogard*, 12 Minn. 293; *Ball v. Com.*, 35 Va. (8 Leigh) 726; *Hatchett v. Com.*, 76 Va. 1026.

⁸ *ARK.*—*Bennett v. State*, 13 Ark. (8 Eng.) 694; *Pleasants v. State*, 15 Ark. 624. *CAL.*—*Jones v. People*, 6 Cal. 352; *People v. Simpson*, 50 Cal. 304. *FLA.*—*Sherman v. State*, 17 Fla. 888. *G.A.*—*Matthis v. State*, 33 Ga. 24; *Davis v. State*, 38 Ga. 98; *Thompson v. State*, 55 Ga. 47; *Mitchell v. State*, 55 Ga. 556; *Russell v. State*, 68 Ga. 785. *IDA.*—*State v. Collette*, 9 Idaho 608, 75 Pac. 271. *ILL.*—*Garrity v. People*, 107 Ill. 162; *Mooney v. People*, 111 Ill. 388; *Graham v. People*, 115 Ill. 566. *IND.*—*Jerry v. State*, 1 Blackf. 395; *Taylor v. State*, 4 Ind. 540; *Williams v. State*, 45 Ind. 157; *Weaver v. State*, 83 Ind. 289; *Davis v. State*, 88 Ind. 145. *IOWA.*—*Winfield v. State*, 3 Iowa 339; *State v. Elliott*, 15 Iowa 72; *State v. Coffee*, 60 Iowa 748, 14 N. W. 129; *State v. Buckley*, 60 Iowa 471, 15 N. W. 289. *KAN.*—*Craft v. State*, 3 Kan. 450; *State v. Tatlow*, 34 Kan. 80, 8 Pac. 267. *LA.*—*State v. White*, 35 La. Ann. 96.

MASS.—*Com. v. Pease*, 137 Mass. 576. *MICH.*—*State v. Henshaw*, 52 Mich. 564, 18 N. W. 360; see, however, *People v. Gordon*, 39 Mich. 508. *MO.*—*State v. Burnside*, 37 Mo. 343; *State v. Connell*, 49 Mo. 282; *State v. Preston*, 77 Mo. 496; *State v. Thomas*, 78 Mo. 813; *State v. Kinney*, 81 Mo. 101; *State v. Hicks*, 92 Mo. 431, 4 S. W. 742. *NEB.*—*Palmer v. People*, 4 Neb. 68; *Murphy v. State*, 15 Neb. 383, 19 N. W. 489. *N. M.*—*Territory v. Webb*, 2 N. M. 147. *PA.*—*Com. v. Flanigan*, 7 Watts & S. 415, 422; *Com. v. Gallagher*, 4 Penn. L. J. 514, 2 Clark 297. *S. C.*—*State v. Sims*, 2 Bail. L. 291; *State v. Shiver*, 20 S. C. 392. *TENN.*—*Kirby v. State*, 22 Tenn. (3 Humph.) 289; *Leake v. State*, 29 Tenn. (10 Humph.) 144; *Cassels v. State*, 12 Tenn. (4 Yerg.) 152. *TEX.*—*Walker v. State*, 14 Tex. App. 609; *Schirmacher v. State*, 45 S. W. 802. *VA.*—*Dearis' Case*, 73 Va. (32 Gratt.) 912; *Russell's Case*, 78 Va. 400; *Lewis v. Com.*, 81 Va. 416. *FED.*—*United States v. Daubner*, 17 Fed. 793.

⁹ *Ibid.* *ARK.*—*Pleasants v. State*, 15 Ark. 624. *CAL.*—*People v. Ah-Loy*, 10 Cal. 301; *People v. Wil-*

new trial be granted for a variance which was not expected to on the trial.¹⁰

5. Irregularity in Conduct of Jury.

§ 1753. **MERE INADVERTENT AND INNOXIOUS SEPARATION NOT GENERALLY GROUND FOR NEW TRIAL.** The general rule is that the verdict will not be set aside on account of inadvertent irregularity in a jury, even in a capital case, unless it be such as might affect their impartiality, or disqualify them for the proper exercise of their functions.¹

Hams, 59 Cal. 674. GA.—McLane v. State, 4 Ga. 335; Smith v. State, 63 Ga. 90. ILL.—See Lander v. People, 104 Ill. 248; Aholz v. People, 121 Ill. 563, 13 N. E. 524. IOWA—State v. McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599. NEB.—Murphy v. State, 15 Neb. 383, 19 N. W. 489. NEV.—State v. Crozier, 12 Nev. 300. MO.—State v. Connell, 49 Mo. 282. TEX.—Monroe v. State, 28 Tex. 210, 76 Am. Dec. 58; Walker v. State, 14 Tex. App. 609.

Compare: Rafferty v. People, 72 Ill. 37; Marlatt v. People, 104 Ill. 364.

In capital case where judge has strong doubts whether the evidence justifies the verdict, a new trial should be granted.—Jerry v. State, 1 Blackf. (Ind.) 395.

In Virginia the general court will set aside a verdict only because it is contrary to the evidence, in a case where the jury has plainly decided against the evidence, or without evidence.—Hill's Case, 43 Va. (2 Gratt.) 594.

Where the evidence is contradictory, and the verdict is against the weight of evidence, though a

new trial may be granted by the court trying the case at their discretion, their decision is not examinable by an appellate court.—State v. Cruise, 16 Mo. 391; Herber v. State, 7 Tex. 69; Brite v. State, 10 Tex. App. 368; Grayson v. Com., 47 Va. (6 Gratt.) 712.

¹⁰ State v. Craige, 89 N. C. 475, 45 Am. Rep. 698.

¹ COLO.—May v. People, 8 Colo. 210, 6 Pac. 816. CONN.—State v. Babcock, 1 Conn. 410. GA.—State v. Fox, Georgia Dec. (pt. I) 35; State v. Peter, Georgia Dec. (pt. I) 46. MASS.—Com. v. Roby, 29 Mass. (12 Pick.) 496, 519. MO.—Whitney v. State, 8 Mo. 165; State v. Barton, 19 Mo. 227; State v. Igo, 21 Mo. 459. N. H.—State v. Prescott, 7 N. H. 290. N. Y.—People v. Douglass, 4 Cow. 26, 15 Am. Dec. 332; Bebee v. People, 5 Hill 32. TENN.—Stone v. State, 23 Tenn. (4 Humph.) 27. VA.—Martin v. Com., 29 Va. (2 Leigh) 745; McCarter v. Com., 38 Va. (11 Leigh) 633; Tooele v. Com., 38 Va. (11 Leigh) 714.

For other cases see, *infra*, § 1760.

For English practice see R. v. Woolf, 1 Chit. 401, 18 Eng. C. L. 223.

An exception, however, formerly existed in England, and is still recognized in several of the United States, in felonies, where the jury separate after the opening of the evidence. While on the one hand the present practice in England, and in a portion of the American courts, is to sustain the verdict when such separation has been inadvertent or necessary, and no abuse has resulted from it; on the other hand, it has been considered in several instances that the mere separation, after the case is committed to the jury, is in itself reason for a new trial.²

§ 1754. — IN SOME COURTS THIS VIEW IS NOT ACCEPTED. The latter doctrine was pressed with great rigor by the early common law authorities in all cases, both civil and criminal; it being agreed that by "the law of England, a jury, after the evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment, and without speech with any, unless it be the bailiff, and with him only if they be agreed."¹ A more humane system has since been recognized; and in all cases not capital juries are permitted to separate, until the case is finally committed to them, at the discretion of the court.² In capital cases, however, in some states, under no circumstances will separation be permitted until a verdict is agreed on,³ and so far, as has been already seen,⁴ has this doctrine been pushed in several instances in this country, that it has been held that if a jury when once charged and sworn be discharged, except in case of such necessity as may be considered as the act of God,

² See this examined, in reference to the plea of once in jeopardy, *supra*, §§ 1426 et seq.; and, as to general conduct of jury, *supra*, §§ 1655, 1656.

¹ Co. Lit. 227. See Bac. Ab. Verdicts, pl. 19; Com. Dig. Inquest, F; *supra*, §§ 1655 et seq., 1753.

² R. v. Woolf, 1 Chit. 401, 18 Eng. C. L. 223, 1 Chitty Cr. L. 664.

³ Cochran v. State, 26 Tenn. (7 Humph.) 544. See, *supra*, §§ 1445-1448, 1655 et seq.; Bac. Abr. Juries, G.

⁴ See, *supra*, §§ 1426, 1448.

such discharge in capital cases is a bar to a second trial.⁵ But, as will be seen, this rule is now much relaxed.⁶

⁵ In *Arkansas and Illinois*, in case of separation, the burden is said to be on the prosecution to show that the defendant was not prejudiced by the separation.—*Cornellius v. State*, 12 Ark. (7 Eng.) 782; *Jumpertz v. State*, 21 Ill. 375; *Russell v. People*, 44 Ill. 508; *Adams v. People*, 47 Ill. 376.

In *California*, it was once said that if a juror, in a criminal trial, separate without leave of the court, though with the prisoner's consent, and if the separation was such that he might have been improperly influenced by others, the verdict will be set aside.—*People v. Backus*, 5 Cal. 275.

This decision, however, was declared in 1861 to go "to the verge of the true rule, if not beyond"; and where the jurors separated for the purposes of nature, and it was in evidence that no one communicated with them during this momentary separation, the Supreme Court refused to set aside the verdict.—*People v. Bonney*, 19 Cal. 426.

And subsequently it was decided that separation without permission does not vitiate a verdict, if it be shown that no injury resulted thereby to the defendant.—*People v. Symonds*, 22 Cal. 348.

In *Georgia*, mere exposure to intrusion, intrusion not being proved, does not vitiate a verdict.—*Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528; *Burtine v. State*, 18 Ga. 534; *Epps v. State*, 19 Ga. 102; *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493.

See, also, *State v. Perry*, 44 N. C. (1 Busb. L.) 330, and *supra*, § 1684.

In *Louisiana*, it is said that in all criminal cases, the separation of the jury, though by leave of the court, and with the consent of the accused and his counsel, will vitiate the verdict, if such separation take place after the evidence has been closed, and the charge given.—*State v. Populus*, 12 La. Ann. 710. See *State v. Evans*, 21 La. Ann. 321.

In *Mississippi*, burden on prosecution to disprove impropriety.—In *Mississippi* the tendency of authority is to set aside a verdict after separation, unless it affirmatively appear there was nothing communicated to the jury on the subject of the trial.—*Hare v. State*, 5 Miss. (4 How.) 194; *McCann v. State*, 17 Miss. (9 Smed. & M.) 465; *Boles v. State*, 21 Miss. (13 Smed. & M.) 398; *Nelms v. State*, 21 Miss. (13 Smed. & M.) 500, 53 Am. Dec. 94; *Browning v. State*, 33 Miss. 48; *Ned v. State*, 33 Miss. 364.

In *Minnesota*, when the court, after charging the jury, gave them a recess of five minutes, in which they were allowed to leave the court-room and go at large, without being in charge of an officer, and without objection from either side, this was held to be ground for a new trial.—*State v. Parrant*, 16 Minn. 178.

In *New Hampshire*, *Connecticut*, *North Carolina*, *Indiana*, and *Missouri*, something beyond mere separation must be shown. In *New Hampshire*, after a review of the

⁶ *Infra*, § 1758. See 7 South. Law Rev. 501 et seq.

authorities, the more liberal rule was adopted; it being determined that it is necessary to show something more than mere separation to set aside the verdict.—*State v. Prescott*, 7 N. H. 290. In Connecticut the same course appears to be pursued.—*State v. Babcock*, 1 Conn. 401. In North Carolina, also.—*State v. Miller*, 18 N. C. (1 Dev. & Bat. L.) 500. See 2 N. C. (1 Hayw.) 238, and such separation on misdemeanors being at the discretion of the court.—*State v. Barber*, 89 N. C. 524.

In Indiana, a statute exists permitting separation during trial and before submission of the case.—See *Wyatt v. State*, 1 Blackf. (Ind.) 257; *Porter v. State*, 2 Ind. 435; *Evans v. State*, 7 Ind. 271; *Creek v. State*, 24 Ind. 151. In Missouri, the same view is taken.—*State v. Brannon*, 45 Mo. 329; *State v. Dougherty*, 55 Mo. 69.

New York.—Irregular reception of evidence, or conversing with strangers on the case fatal, but mere separation not by itself sufficient ground.—In New York, mere separation, without permission, appears formerly to have been considered *prima facie* evidence of misbehavior.—See *Spencer, Ch. J.*, in *People v. McKay*, 18 Johns. 218.

But the better opinion now is, that to vitiate the verdict, reasonable suspicion of abuse must exist.—*Horton v. Horton*, 2 Cow. (N. Y.) 589; *People v. Douglass*, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; *Oliver v. Trustees*, 5 Cow. (N. Y.) 284; *People v. Ransom*, 7 Wend. (N. Y.) 423; *People v. Bebee*, 5 Hill (N. Y.) 32.

—"The conclusion from these cases," said Sutherland, J., "ap-

pears to me to be this: that any mere informality or mistake of an officer in drawing a jury, or any irregularity or misconduct in the jury themselves, will not be sufficient ground for setting aside a verdict, either in a criminal or civil case, where the court are satisfied that the party complaining has not, and could not, have sustained any injury from it."—*People v. Ransom*, 7 Wend. (N. Y.) 423.

After the evidence in a trial for murder had all been submitted, six of the jurors, leaving their fellows, went, under the charge of an officer, on a walk for exercise, in the course of which they visited and viewed the premises where the homicide was alleged to have been committed, and returned after an absence of an hour. No person had been permitted to speak to them, and no improper conduct had taken place. But after conviction and sentence this was ruled to be good ground for a new trial.—*Eastwood v. People*, 3 Park. Cr. Rep. (N. Y.) 25; affirmed 14 N. Y. 562.

See, also, *supra*, § 1642.

But where a jury, impaneled to try a prisoner upon an indictment for murder, were allowed to leave the court-house during the trial, under the charge of two sworn constables, and having left the court-house two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some with them on their return, and drank spirituous liquor, though not enough to affect them in the least, and one of them conversed with strangers on the subject of the trial, it was held, that though the mere sepa-

ration was not, in itself, fatal, the drinking of spirituous liquor, and the conversing on the case, were sufficient reasons for a new trial.—*People v. Douglass*, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332.

In the same state it has been held by a majority of the court, that on the record alone, it is not error in law, in a capital trial, for the judge, with the unsolicited assent of the prisoner, to permit the jury to separate from time to time before the charge is given to them, and they retire to deliberate upon their verdict.—*Stephens v. People*, 19 N. Y. 549.

Consent of prisoner to his trial by less than a full jury of twelve is a nullity, and a conviction thereby produced is illegal.—*Ruloff v. People*, 18 N. Y. 179. See, *supra*, § 1668.

In Ohio, by the Code of Criminal Procedure, §§ 164, 165, "in the trial of felonies the jury shall not be permitted to separate, after being sworn, until discharged by the court. In the trial of misdemeanors, they shall not be permitted to separate after receiving the charge of the court, until discharged." See *Hurley v. State*, 6 Ohio 399; *Davis v. State*, 15 Ohio 72, 45 Am. Dec. 559; *Poage v. State*, 3 Ohio St. 229; *Dobbins v. State*, 14 Ohio St. 493.

See, also, *supra*, § 1441.

In Pennsylvania, in a capital case before the Supreme Court, in 1851, it appeared by the record that, "on the 15th of March, 1851, after the jury were sworn, it was agreed by the counsel of the commonwealth and the counsel of the defendant, and agreed by the court, that the jurors sworn in this case be permitted to separate

and return to their respective homes, and return to the jury box on Tuesday morning next, March 18th," when they all attended, and a verdict of murder in the first degree was rendered. The judgment was reversed, and the prisoner ordered back for another trial.—*Peiffer v. Com.*, 15 Pa. St. 471. See, *supra*, § 1686.

Subsequently, on the trial of a party, charged with burglary, the jury, after being cautioned by the court to avoid all conversation with any person about the case, were allowed to separate at the usual times of adjournment.—*McCreary v. Com.*, 29 Pa. St. 323.

In South Carolina separation is at discretion of court.—In South Carolina, the jury, it is said, are not required to remain together even after they are charged, though the case be capital (*State v. McKee*, 1 Ball. L. (S. C.) 651, 21 Am. Dec. 499); and it is ruled that it is within the sound discretion of the presiding judge to allow a juror to leave the jury-box for a brief time, even during the trial of a capital case.—*State v. McElmurray*, 3 Strobb. (S. C.) 33.

In Tennessee, it has been determined that where there is an unauthorized separation of a jury for fifteen or twenty minutes, it is not necessary for the prisoner to prove that they were during their absence tampered with; it is sufficient if they might have been.—*McLain v. State*, 18 Tenn. (10 Yerg.) 241, 31 Am. Dec. 573; *Jarnagin v. State*, 18 Tenn. (10 Yerg.) 529; though see *Stone v. State*, 23 Tenn. (4 Humph.) 27; *Hines v. State*, 27 Tenn. (8 Humph.) 597.

Where, however, it was affirmatively shown that no communica-

§ 1755. SEPARATION BEFORE CASE IS OPENED ALWAYS PERMISSIBLE. Separation before the case is opened and the jury charged does not seem, even in the strictest practice, to be considered cause for setting aside a verdict.¹ Thus, where the jury had been impaneled and sworn, and where, before any evidence was given, three of the jurors separated from their fellows for a brief space of time, it was ruled that such separation, before any evidence given, was no cause for setting aside a verdict of conviction; especially in the case at bar, where the separation was so momentary that any tampering with the jurors was hardly possible.² In another case, in impaneling a jury for trial on an indictment for felony, eight were elected and sworn, and three elected but not sworn; one, who had been sworn, separated from the rest, went some miles off and stayed

tion with other persons was had, a new trial was refused.—*Hines v. State*, 27 Tenn. (8 Humph.) 597.

—In felonies, however, a separation from day to day, even with the prisoner's consent, vitiates the verdict.—*Wiley v. State*, 31 Tenn. (1 Swan) 256.

—Consent to separation by the defendant and by the state's attorney, allowed by the court in a capital case, new trial will be granted.—*Wesley v. State*, 30 Tenn. (11 Humph.) 502; *Willey v. State*, 31 Tenn. (1 Swan) 256.

—One juror separating from rest is ground for a new trial without evidence that he was in communication with any one.—*Hines v. State*, 27 Tenn. (8 Humph.) 597.

In Virginia, the weight of authority is, that in cases of felony it is not necessary, in order to set aside the verdict, to show actual tampering, or conversation on the subject of the trial, with a jurymen, but that the mere fact of the separation from the custody of the

officer is usually sufficient.—See *Com. v. McCaul*, 3 Va. (1 Va. Cas.) 271; *Overbee v. Com.*, 40 Va. (1 Rob.) 756; *Phillips v. Com.*, 60 Va. (19 Gratt.) 485.

—Bare possibility of tampering, it is conceded, is not adequate reason for a new trial.—*Sprouce v. Com.*, 4 Va. (2 Va. Cas.) 375; *Kennedy v. Com.*, 4 Va. (2 Va. Cas.) 510; *Martin v. Com.*, 29 Va. (2 Leigh) 743; *McCarter v. Com.*, 38 Va. (11 Leigh) 633; *Tooe v. Com.*, 38 Va. (11 Leigh) 714; *Thompson's Case*, 49 Va. (8 Gratt.) 638.

See, also, *State v. Cucuel*, 31 N. J. L. (2 Vr.) 249, and *supra*, §§ 1653, 1654.

¹ *Cohron v. State*, 20 Ga. 752; *State v. Cucuel*, 31 N. J. L. (2 Vr.) 249; *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308, explaining and limiting *Com. v. Clue*, 3 Rawle (Pa.) 498; *Martin v. Com.*, 29 Va. (2 Leigh) 745.

See, also, *supra*, §§ 1454, 1455.

² *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308.

some hours; the other ten were put in charge of the sheriff, to be kept together and separate from other persons, until the ensuing morning; the absconding jurymen was taken the same night, and placed in the same room with the other jurymen until next morning; but there appeared to have been no conversation on the subject of the prosecution; the next morning, by allowance of the court, this jurymen was challenged by the prisoner for cause, and set aside, and the jury was then completed. On a motion for a new trial, after conviction, it was held that the separation of the absconding jurymen from his fellows, and his subsequent association with them, though he was afterwards struck from the panel, did not vitiate the verdict, and was no good reason for a new trial.³ Yet in all cases jurors, after being sworn, should be directed by the court to hear or read nothing on the subject of the case.

§ 1756. IN MISDEMEANORS JURY MAY SEPARATE DURING TRIAL. In misdemeanors it is the practice to permit the jury to separate during the trial. Thus, in a case which has been generally followed in this country, on a motion for a new trial, after conviction for conspiracy, it appeared that the trial had lasted two days; that on the first day the court sat from the morning until eleven o'clock at night; and that on the adjournment the jury separated, going to their several homes, and returned the next morning. The separation was without the knowledge of the defendant and his counsel, and without the consent of the court. It was held, however, not to constitute ground for disturbing the verdict of guilty which the jury rendered.¹

³ *Tooele v. Com.*, 38 Va. (11 Leigh) 714; *supra*, § 1455.

¹ *R. v. Woolf*, 1 Chit. 401, 18 Eng. C. L. 223.

To same effect, *Wyatt v. State*, 1 Blackf. (Ind.) 25. See *Ex parte Hill*, 3 Cow. (N. Y.) 355; *State v. Carstaphen*, 3 N. C. (2 Hayw. L.)

238; *State v. Miller*, 18 N. C. (1 Dev. & Bat. L.) 500; *State v. Barber*, 89 N. C. 524; and cases in prior section.

In Indiana such separation is allowed in all cases by statute.—*Evans v. State*, 7 Ind. 271. See, also, *supra*, § 1755, footnote 5.

§ 1757. — AND SO IN FELONIES LESS THAN CAPITAL. Even in felonies less than capital the jury are generally permitted to separate at the adjournments of the court until the period when, at the close of the trial, the case is finally committed to their charge. After this, they must remain together until they agree, or until they are discharged by the court.¹ When a sealed verdict is permitted, there may be a separation after giving the verdict to the foreman.²

§ 1758. — BUT NOT GENERALLY IN CAPITAL FELONIES. Separation, after the jury are sworn and the case opened,¹ has in capital cases been considered a ground for new trial, even without any evidence that the jury were communicated with concerning the case;² and if the object is to exclude tampering, such a precaution is as necessary before as after the final committal of the case. Yet lately a more liberal practice has arisen, based on the difficulty

¹ State v. McKinney, 31 Kan. 570, 3 Pac. 355; Dallas v. State, 35 La. Ann. 899; Com. v. Tobin, 125 Mass. 208, 28 Am. Rep. 220; M'Creary v. Com., 29 Pa. St. 323; Clifford v. State, 58 Wis. 477, 17 N. W. 304.

In Ohio, otherwise by statute.—See, supra, § 1754, footnote 5.

² Silvey v. State, 71 Ga. 553; supra, § 1682.

¹ State v. Burnes, 33 Mo. 483.

Until commencement of case defendant is not supposed to be in jeopardy.—See, supra, § 1454.

Compare: McQuillen v. State, 16 Miss. (8 Smed. & M.) 587.

—not until jury charged with case is the holding of some authorities.—Highlands v. Com., 111 Pa. St. 1, 56 Am. Rep. 235, 2 Atl. 70. See Oliveros v. State, 120 Ga. 237, 1 Ann. Cas. 114, 47 S. E. 627; In

re McClasky, 2 Okla. 568, 27 Pac. 854.

As to when jury has defendant in charge, see Com. v. Fritch, 9 Pa. Co. Ct. Rep. 164.

² See cases cited supra, §§ 1455, 1668; Peiffer v. Com., 15 Pa. St. 468, 53 Am. Dec. 605; Wesley v. State, 30 Tenn. (11 Humph.) 502, where it was said that the irregularity could not be cured by the prisoner's consent.

In Texas, same principle prevails.—Grissom v. State, 4 Tex. App. 374.

Compare: Jumpertz v. People, 21 Ill. 375; Quinn v. State, 14 Ind. 589; State v. Frank, 23 La. Ann. 213; Woods v. State, 43 Miss. 364; McLean v. State, 8 Mo. 153.

Under Ohio statute, see Poage v. State, 3 Ohio St. 229.

Question of consent is discussed supra, § 1668.

of keeping juries together, without sickness or great business inconvenience, during protracted trials; and cases are not infrequent in which, even in capital issues, juries have been permitted to separate at the adjournments of the court, down to the period in which the case is finally committed to their deliberation.³ Nor can it be denied that there is growing reason for the acceptance of this view. No juries composed of right materials can be kept together day and night during the trial of a case which lasts for days if not for weeks, without great discomfort and risk to themselves, and positive damage to the business community. We have, therefore, to decide between one of three courses: We must go on with a case, according to the old English fashion, day and night, until it terminates; or we must make up our juries from idlers, if not vagrants, whose seclusion will be no public loss, and perhaps not much inconvenience to themselves; or, if we summon business and family men charged with other duties, and thus competent to decide difficult issues, we must permit such adjournments and separations during trial as will preserve the health and protect the business relations of the jurors. If such men be obtained on a jury, there is no more reason for their confinement and seclusion than there is for the confinement and seclusion of the judges trying the case. Of course stringent charge should be made in any view to the jurors to listen to nothing out of court on the subject of the case; and these admonitions

³ *Infra*, § 1763. ARK.—Coker v. State, 20 Ark. 53. CAL.—People v. Bonney, 19 Cal. 426. CONN.—State v. Babcock, 1 Conn. 401. ILL.—Adams v. People, 47 Ill. 376. IOWA—State v. Feller, 25 Iowa 67. KAN.—State v. Hendricks, 32 Kan. 559, 4 Pac. 1050. MINN.—State v. Ryan, 13 Minn. 370. MO.—State v. Brannon, 45 Mo. 329. NEB.—Card v. State, 3 Neb. 357; Crim. Proc.—139

Polin v. State, 14 Neb. 540, 16 N. W. 898. N. Y.—People v. Douglass, 4 Cow. 26, 28, 15 Am. Dec. 332; Stephens v. People, 19 N. Y. 549; see Eastwood v. People, 3 Park. Cr. Rep. 25. N. C.—State v. Miller, 18 N. C. (1 Dev. & B. L.) 500. S. C.—State v. Anderson, 2 Ball. L. 565; State v. McKee, 1 Ball. L. 651; State v. McElmurray, 3 Strob. L. 33; State v. Belcher, 13 S. C. 459.

should be followed, not only by new trials, but by severe punishment of the offending jurors, if the injunction be not obeyed.⁴

§ 1759. COURT IN SUCH CASES MAY ADJOURN FROM DAY TO DAY. In cases of such sickness or temporary incapacities as do not permanently touch the competency of the jury, the court may adjourn the jury from day to day, until the incapacity is removed; nor is there any reason to doubt that, with the limitations hereinafter expressed, the jury, due caution being given them by the court, may be permitted to separate. On this point may be accepted the remarks of Judge Story, in a case where the principal witness for the prosecution refusing to testify, the case was brought to a stand-still, whereupon the court, on motion of the district attorney, discharged the jury, and remanded the case for another trial.¹ From the printed report it does not appear that the order of the court was that the jury should be discharged, but merely that the case should be postponed. And what has just been quoted applies to a mere motion to adjourn the trial.

In England short adjournments have been permitted to enable a witness to be instructed as to the nature of an oath;² but in felonies it is said that the judge has no power even to order an adjournment from day to day on account of absence of prosecutor or witnesses:³ It is otherwise, however, when a juror or prisoner is taken so ill as to be unable to proceed with the trial.⁴

⁴ Striking remarks on this point of Strong, J., are reported in *Stephens v. People*, 19 N. Y. 550.

¹ *State v. Bullock*, 63 N. C. 570; *United States v. Coolidge*, 2 Gall. 364, Fed. Cas. No. 14858; *United States v. Haskell*, 4 Wash. 402, Fed. Cas. No. 15321.

See, also, *supra*, §§ 1445, 1658 et seq.

² See 1 Whart. Crim. Ev. (Hilton's ed.), §§ 371 et seq.

³ *R. v. Perkins*, 1 Ld. Raym. 64; *R. v. Tempest*, 1 F. & F. 381; *R. v. Parr*, 2 F. & F. 861; *R. v. Robson*, 4 F. & F. 360.

⁴ *Supra*, § 1445.

§ 1760. CONFLICT OF OPINION AS TO WHETHER SEPARATION AFTER COMMITMENT OF CASE IS PERMISSIBLE. A summary of law as to separation of jurors after the final commitment to them of the case may be given as follows: 1. Separation of the jury, in a capital case, after they have been sworn and impaneled, in such a way as to expose them to tampering, may be ground for a new trial.¹ The authorities, however, differ as to whether, (a) This ground is absolute; or, (b) *prima facie*, subject to be rebutted by proof from the prosecution that no improper influence reached the jury; or, (c) merely contingent upon proof to be offered by the defense that a tampering really took place.

§ 1761. —COURTS HOLDING SUCH SEPARATION ABSOLUTELY FATAL. (a) Among those holding the first view, the courts of New Jersey,¹ Pennsylvania,² Louisiana,³ Mississippi,⁴ and Tennessee⁵ take, at least in capital cases, the most extreme position, they maintaining that even consent of prisoner can not, in such cases, cure a separation.⁶

¹ A juror retiring in case of necessity with a bailiff is no separation.—*Neal v. State*, 64 Ga. 272; *Skates v. State*, 64 Miss. 644, 1 So. 843; *State v. Collins*, 86 Mo. 245; *State v. Payton*, 90 Mo. 220, 2 S. W. 394; *State v. Washburn*, 91 Mo. 571, 4 S. W. 274.

¹ *State v. Cucuel*, 31 N. J. L. (2 Vr.) 249.

² *Peiffer v. Com.*, 15 Pa. St. 469.

³ *State v. Crosby*, 4 La. Ann. 434; *State v. Populus*, 12 La. Ann. 710.

In Louisiana, however the separation must appear of record to be ground for reversal.—*State v. Populus*, 12 La. Ann. 710.

⁴ *Woods v. State*, 43 Miss. 364.

In Mississippi, however, a more liberal view has been subsequently

taken.—*Coleman v. State*, 59 Miss. 484.

⁵ *Wesley v. State*, 30 Tenn. (11 Humph.) 502; *Wiley v. State*, 31 Tenn. (1 Swan) 256; *Odle v. State*, 65 Tenn. (6 Baxt.) 159.

⁶ See, *supra*, §§ 1455, 1719.

Compare: *McLean v. State*, 8 Mo. 153; *State v. Murray*, 91 Mo. 95, 3 S. W. 397; *Com. v. McCaul*, 3 Va. (1 Va. Cas.) 271; *Overbee v. Com.*, 40 Va. (1 Rob.) 756.

In *Early v. State*, 1 Tex. App. 248, 28 Am. Rep. 409, it was held that even a separation (without consent) caused by a fire burning the hotel where the jury were confined, vitiates the verdict, though the jurymen all swore that they heard nothing from outside as to the case. Bare separation under

§ 1762. — COURTS HOLDING SUCH SEPARATION ONLY PRIMA FACIE GROUND FOR NEW TRIAL. (b) That such separation, in a capital case, is prima facie ground for a new trial, subject to be rebutted by proof from the prosecution that no improper influence reached the jury, is the position generally taken by the American courts.¹

§ 1763. — COURTS HOLDING SUCH SEPARATION FATAL ONLY WHERE THERE IS PROOF OF TAMPERING. (c) There are, however, cases in which it has been held that separation of the jury is only ground for new trial when sustained by proof of tampering, the burden of which is on the defendant.¹ In some courts, also, it is held that the ques-

statute is ground for reversal in capital cases.—State v. Collins, 81 Mo. 652.

¹ ARK.—Cornellus v. State, 12 Ark. (7 Eng.) 732; Binns v. State, 35 Ark. 118; Wright v. State, 35 Ark. 693. CAL.—People v. Symonds, 22 Cal. 348, reviewing People v. Backus, 5 Cal. 275; People v. Bush, 68 Cal. 623, 10 Pac. 169. COLO.—Elkin v. People, 5 Colo. 508. CONN.—State v. Babcock, 1 Conn. 401. FLA.—Coleman v. State, 17 Fla. 206. GA.—Cohron v. State, 20 Ga. 752. ILL.—Jumpertz v. People, 21 Ill. 373; Reins v. State, 30 Ill. 256. IND.—Creek v. State, 24 Ind. 151. KAN.—Madden v. State, 1 Kan. 340. MASS.—Com. v. Roby, 29 Mass. (12 Pick.) 496. MINN.—Maher v. State, 3 Minn. 444. MISS.—Caleb v. State, 39 Miss. 721; Skates v. State, 64 Miss. 644, 1 So. 843. N. H.—State v. Prescott, 7 N. H. 291. N. Y.—People v. Douglass, 1 Cow. 26; Eastwood v. People, 14 N. Y. 562; Eastwood v. People, 3 Park. Cr. Rep. 25. N. C.—State v. Tilghman, 33 N. C. (11 Ired. L.) 514. R. I.—State v. O'Brien, 7 R. I. 337.

TENN.—Hines v. State, 27 Tenn. (8 Humph.) 597. TEX.—Cox v. State, 7 Tex. App. 1; West v. State, 7 Tex. App. 150. VA.—Phillips v. Com., 60 Va. (19 Gratt.) 485. WIS.—Rowan v. State, 30 Wis. 132; State v. Dolling, 37 Wis. 396.

After a conviction of manslaughter it is no ground for a reversal that one of the jurors had been absent, during an adjournment of the case, for ten days, in the custody of a sworn officer, under suitable instructions; though it would have been otherwise had the conviction been for a capital offense.—Moss v. Com., 107 Pa. St. 267.

¹ Supra, § 1758. FLA.—Bird v. State, 18 Fla. 493. IND.—Medler v. State, 26 Ind. 171; Riley v. State, 95 Ind. 446. KAN.—State v. Hendricks, 32 Kan. 559, 4 Pac. 1050. N. Y.—People v. Reagle, 60 Barb. 527. NEV.—State v. Jones, 7 Nev. 408; State v. Harris, 12 Nev. 414; State v. Pritchard, 15 Nev. 100. S. C.—State v. Stewart, 26 S. C. 125, 1 S. E. 468. TENN.—Mann v. State, 40 Tenn. (3 Head.) 373; Cartwright v. State, 80 Tenn. (12 Lea) 620. TEX.—Russell v. State,

tion of the rightfulness of such separation is within the discretion of the judge trying the case, not subject to revision on error;² but this only holds in cases in which there has been no manifest injustice exhibited on the record.³

§ 1764. ——— THE LATTER VIEW HELD AS TO MISDEMEANORS. 2. In felonies not capital, and misdemeanors, it is for the defendant to prove tampering; and separation is within the discretion of the court.¹

11 Tex. App. 288. VT.—*State v. Camp*, 23 Vt. 551. WIS.—*Crockett v. State*, 52 Wis. 211, 8 N. W. 603.

Consent to separation and waiver of objection because thereof, such separation does not, per se, invalidate the verdict.—*State v. McMahon*, 17 Nev. 373, 30 Pac. 1003.

Failure to keep jurors in custody is prima facie evidence for a new trial.—*State v. Pritchard*, 15 Nev. 100.

Juror constantly in presence of sworn officer, rule as to separation does not apply.—See note to 43 Am. Dec. 82.

Juror so situate he could exchange single word with stranger without being overheard by the officer in charge is sufficient to establish a technical separation of the jury.—*State v. Harris*, 12 Nev. 414, 422.

See, also, notes, 43 Am. Dec. 87; 103 Am. St. Rep. 168.

Part of jury with sheriff, balance locked in room with unsworn deputy, not ground for new trial.—*Phillips v. Com.*, 59 Va. (18 Gratt.) 983, 98 Am. Dec. 765.

Person not juror remaining over night in grand jury room, ground for a new trial.—*Wright v. State*, 17 Tex. App. 152.

Prosecution must show separa-

tion not prejudicial, or separation of jury ground for a new trial.—*State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State v. Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982.

Separation of one juror ground for new trial.—*Wright v. State*, 17 Tex. App. 152.

Separation from others to take part in dramatic performance by juror, without being attended by sheriff, ground for new trial although defendant consented to separation in sheriff's custody.—*Wilson v. State*, 18 Tex. App. 576.

Separation not cause for new trial when it is shown that no juror had any communication with any outside person in relation to the case, or received any impressions except those derived at the trial.—*State v. Ward*, 19 Nev. 301, 10 Pac. 134.

See, also, note 43 Am. Dec. 82.

² *Sargent v. State*, 11 Ohio 472; *State v. Engle*, 13 Ohio 490; *Davis v. State*, 15 Ohio 72; *State v. Anderson*, 2 Bail. L. (S. C.) 565; *State v. McElmurray*, 3 Strobb. L. (S. C.) 34.

See, also, *supra*, §§ 1436 et seq. 1668, 1753.

³ See, *supra*, §§ 1433 et seq.

¹ See cases cited *supra*, §§ 1753, 1754; *State v. Madoil*, 12 Fla. 151.

§ 1765. — PREVAILING VIEW IS THAT SUCH IRREGULARITIES MAY BE CURED BY CONSENT. 3. Even should separation, prior to charge of court, irregularly take place, without tampering, this, according to the preponderance of authority, may be cured by the defendant's consent.¹

Until the panel is complete, separation may in any view take place.²

§ 1766. UNSWORN OR IMPROPER OFFICER IN CHARGE GROUND FOR NEW TRIAL; INTRUSION OF OFFICER DURING DELIBERATIONS. As has been already noticed,¹ the officer having charge of the jury should be duly sworn to keep them "in some convenient and private place," etc., "and not suffer any person to speak with them, nor to speak to them yourself on the subject of the case, without leave of court." Should the jury be accompanied by an unsworn officer, the verdict will be set aside unless it appear affirmatively that it was not in any way influenced by the inadvertence.² A series of officers may be successively sworn for this purpose, to keep up the chain of attendance.³ But it is not, in all jurisdictions, necessary that the officer should have a special jurat.⁴ Nor is it ground for new trial that among the deputy sheriffs who had general custody of the jury was one who was a witness on the

¹ Supra, §§ 366, 1455, 1668.

² Supra, § 1454.

¹ Supra, § 1663.

² ILL.—McIntyre v. People, 38 Ill. 514; Wilhelm v. People, 72 Ill. 468. MISS.—Hare v. State, 5 Miss. (4 How.) 187; McCann v. State, 17 Miss. (9 Smed. & M.) 465. TENN.—Luster v. State, 30 Tenn. (11 Humph.) 169. WIS.—Brucker v. State, 16 Wis. 333.

Compare: Trim v. Com., 59 Va. (18 Gratt.) 983, 98 Am. Dec. 765.

Officer's oath must be specific.—See Spain v. State, 67 Tenn. (8 Baxt.) 514.

If the record avers that the jury

were in charge of the proper officer, the presumption is that he was sworn.—Clark v. State, 67 Tenn. (8 Baxt.) 591.

³ See Com. v. Jenkins, Thach. C. C. 118; Com. v. Wormeley, 49 Va. (8 Gratt.) 708, 712, 56 Am. Dec. 162.

⁴ Doyal v. State, 70 Ga. 134; Davis v. State, 15 Ohio 72, 45 Am. Dec. 559; Stone v. State, 23 Tenn. (4 Humph.) 27.

In Missouri the officer must be sworn when the jury pass into his charge (State v. Underwood, 76 Mo. 630), and this is the better view.

trial for the prosecution,⁵ though it has been held otherwise when the officer actually in close attendance was such a witness.⁶

The intrusion even of a legally qualified officer on the deliberations of the jury may be a ground for new trial,⁷ though there is good reason as well as high authority to hold that when the officer is shown to have in no way interfered with the deliberations, such presence being for the comfort and security of the jury, and in no way acting as a restraint or pressure on them, this does not vitiate the verdict.⁸

It is a violation of duty, which is ground for a new trial, for the officer to speak to the jury on the case, unless to ask whether they have agreed on a verdict;⁹ or to treat them, he hoping for a reward in case of conviction.¹⁰

§ 1767. IMPROPER RECEPTION OF MATERIALS OF PROOF GROUND FOR NEW TRIAL. The jury are entitled to take out with them such papers and instruments of evidence as have been admitted in the case, provided all asked for are sent out, and the action of the court in this respect be at

⁵ *Read v. Com.*, 63 Va. (22 Gratt.) 924. See, *infra*, § 1755.

⁶ *State v. Snyder*, 20 Kan. 306; *McElrath v. State*, 32 Tenn. (2 Swan) 378; *infra*, § 1790.

⁷ *People v. Knapp*, 42 Mich. 267, 32 Am. Rep. 156, 3 N. W. 927.

There are many cases, however, in which officers in charge are necessarily in attendance during the jury's deliberations. Such attendance should only be ground to set aside the verdict when it amounts to presence during the jury's discussions, or when it interferes with freedom of deliberation, or when the officer is shown to have a bias in the case, or, as has been seen, not to have been duly qualified.

⁸ GA.—*Jones v. State*, 68 Ga. 760. ILL.—*Gainey v. People*, 97 Ill. 270, 37 Am. Rep. 109. KY.—*Com. v. Shlds*, 65 Ky. (2 Bush) 81. MO.—*State v. Hopper*, 71 Mo. 425. N. Y.—*People v. Hartung*, 8 Abb. Pr. 132, 17 How. Pr. 85, 4 Park. Cr. Rep. 216, 256; affirmed 4 Park. Cr. Rep. 319, which case is reversed 22 N. Y. 95; *People v. Wilson*, 4 Park. Cr. Rep. 619, reversing 8 Abb. Pr. 137. VT.—*State v. Hopkins*, 35 Vt. 250. VA.—*Read v. Com.*, 63 Va. (22 Gratt.) 924. WIS.—*Crockett v. State*, 52 Wis. 211, 8 N. W. 603.

⁹ *Rickard v. State*, 74 Ind. 275; *State v. Dallas*, 35 La. Ann. 899.

¹⁰ *People v. Myers*, 70 Cal. 582, 12 Pac. 719.

the close of the trial, in open court and before the parties.¹ Should the jury receive any material paper, book, or other article, likely to affect their deliberations, which has not been put in evidence, this, if leading to a conviction, will be a cause for setting aside the verdict,² unless the reception was not objected to at the time by defendant's counsel, though then cognizant of the fact.³

In another volume⁴ will be found an enumeration of the cases in which the jury are permitted to inspect articles material to the issue. If this be done out of court, in the absence of the defendant, it is a fatal irregularity. Hence, experiments by a jury with old boots to see whether they would make tracks of a particular kind, such experiments being out of court, and without leave of court, will vitiate a conviction.⁵ But it is otherwise when the court grant leave, in the presence of parties, to take out the articles in question.⁶ Thus it is no ground for a new trial that the court permitted the jury to take out a bottle of ale which was a part of the ale whose manufacture was the subject of the trial.⁷ But it is settled, that a verdict will be set aside when the jury, during their deliberations, receive a paper of any character, not in evi-

¹ Rainforth v. State, 61 Ill. 365; State v. Tompkins, 71 Mo. 613.

² Supra, § 1664; Co. Lit. 227; 2 Hale P. C. 306. ARK.—Atkins v. State, 16 Ark. 568. IDA.—People v. Page, 1 Ida. 102. ILL.—Yates v. People, 38 Ill. 527. IND.—See Jones v. State, 89 Ind. 82. MASS.—Whitney v. Whitman, 5 Mass. 405; Com. v. Edgerly, 92 Mass. (10 Allen) 184. ENG.—R. v. Sutton, 4 Moo. & S. 532.

As to taking exhibits to jury room, see People v. Paget, 1 Ida. 102; Cudahy Packing Co. v. Skoumal, 60 C. C. A. 306, 125 Fed. 475.

³ Jackson v. State, 76 Ga. 551;

State v. Nichols, 29 Minn. 357, 13 N. W. 153.

⁴ 1 Whart. Crim. Ev. (Hilton's ed.), § 312.

⁵ State v. Saunders, 68 Mo. 120.

⁶ Powell v. State, 61 Miss. 319.

⁷ State v. McCafferty, 64 Mo. 223.

As to what papers go out, see Udderzook v. Com., 76 Pa. St. 340.

Delivery of bundle of depositions to jury, by the solicitor for the plaintiffs, after the evidence was concluded, a portion of which were not in evidence, the verdict for the plaintiffs was set aside, though the jury swore that they had not opened the bundle.—2 Hale P. C. 308.

dence, calculated to lead them to the verdict they render,⁸ there being no proof offered that the jury were not prejudiced by the paper.⁹ It is otherwise where a paper, without the action of the successful party, finds its way into the jury-box, but is not read by the jury.¹⁰

§ 1768. — So OF IRREGULAR RECEPTION OF BOOKS. The old rule was that if a jury send for a book, on their own motion, after they have retired, and read it, their verdict is avoided;¹ and this distrust has been extended so far as to withhold from the jury treatises on law which both parties consent to permit the jury to read. Thus, on one occasion, Lord Tenterden, though the counsel on both sides consented, refused to send out to the jury, on their request, a copy of Selwyn's Law of Nisi Prius, observing that the proper course for the jury to adopt was for them to come into court, state their question, and receive the law from the court.² The reception by the jury, also, with-

* KAN.—*State v. Taylor*, 20 Kan. 643. N. Y.—*Hackley v. Hastee*, 3 Johns. 252. PA.—*Sheaff v. Gray*, 2 Yeates 273; *Alexander v. Jamieson*, 5 Binn. 238; *Com. v. Landis*, 12 Phila. 576, 34 Leg. Int. 204. S. C.—*State v. Tindall*, 10 Rich. L. 212. FED.—*Lonsdale v. Brown*, 4 Wash. 148, Fed. Cas. No. 8494. ENG.—*Vicary v. Farthing*, Cro. Eliz. 411, 78 Eng. Repr. 653.

* *State v. Lantz*, 23 Kan. 728, 33 Am. Rep. 215; *Com. v. Landis*, 12 Phila. (Pa.) 576; *Carter v. State*, 77 Tenn. (9 Lea) 440.

¹⁰ *Hix v. Drury*, 22 Mass. (5 Pick.) 296; *Com. v. Edgerton*, 92 Mass. (10 Allen) 184.

New trial will not be granted after conviction in a capital case merely because the jury, during their deliberations, became possessed of and read a newspaper, containing a report of the trial,

but no comments thereon which could prejudice the prisoner; nor because they had the statute defining the offense under trial before them during their deliberations.—*People v. Gaffney*, 14 Abb. Pr. N. S. (N. Y.) 36, *Sheld. (N. Y.)* 304; affirmed, 50 N. Y. 416.

—Otherwise where the reports are imperfect.—*Walker v. State*, 37 Tex. 366. See *Wilson v. People*, 4 Park. Cr. Rep. (N. Y.) 619.

In *Farrar v. State*, 2 Ohio St. 54, where a jury, without the knowledge or aid of any one, procured a part of a newspaper containing the charge of the judge in the cause, and used it to guide their deliberations, although the report was accurate, the verdict was set aside.

¹ Vin. Abr., pl. 18; Co. Lit. 227. See *Farrar v. State*, 2 Ohio St. 54.

² See *Hunnlicutt v. State*, 18 Tex.

out application to and consent of the court, of the statutes bearing on the case, has been ruled ground for setting aside a verdict of conviction;³ but it has been held to be no such ground that the jury during their deliberations had the opportunity of access to a set of state reports;⁴ or that they obtained a copy of the code in order to frame their verdict.⁵

§ 1769. — So OF RECEPTION OF REPORTS OF EVIDENCE. Does the reception by the jury of a report of the evidence avoid the verdict? It certainly does not when the jury do not read the paper, or read only collateral matters from the same paper not relative to the case. Thus, where the officers attending upon the jury, under a mistake of duty, permitted them to read the newspapers, the officers first inspecting them, and cutting out everything that in any manner related to the trial; and it appeared that, in point of fact, the jurors never saw anything in

App. 523; *Burrows v. Unwin*, 3 Car. & P. 310, 14 Eng. C. L. 583.

In a case of treason, before Wilson, Blair, and Patterson, justices, in the United States Circuit Court, the jury, as is stated by Mr. Dallas, were permitted, with consent of parties, to take with them Foster's Crown Law, and the Acts of Congress.—*United States v. Vigol*, 2 U. S. (2 Dallas) 347, 1 L. Ed. 410, Whart. State Tr. 176.

The Supreme Court of Louisiana, in 1871, in a case where the allegation was that the jury, in considering their verdict, were allowed by the trial judge "to have in their room Wharton's Crim. Law, to consult in relation to their verdict," declared "that we see no force in the point."—*State v. Tally*, 23 La. Ann. 678.

In *Durham v. State*, 70 Ga. 264, it was held that assent by defendant's

counsel to the jury deliberating in the court-room, though counsel was advised that the court-room contained law books bearing on the case, precluded an objection being taken to the jury reading the books.

³ *State v. Kimball*, 50 Me. 509; *State v. Smith*, 6 R. I. (3 Ames) 33; *Merrill v. Navy*, 6 R. I. (3 Ames) 33; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200.

Contra: *People v. Gaffney*, 14 Abb. Pr. N. S. (N. Y.) 36, Sheld. 304; affirmed 50 N. Y. 416; *Loew v. State*, 60 Wis. 559, 19 N. W. 437.

⁴ *State v. Harris*, 34 La. Ann. 118; *State v. Hopper*, 71 Mo. 425.

⁵ *Graves v. State*, 63 Ga. 740; *State v. Tanner*, 38 La. Ann. 307; *People v. Draper*, 28 Hun (N. Y.) 1, 1 N. Y. Cr. Rep. 134.

any newspaper relative to the trial, and after the charge from the court were not allowed to see any until after they had delivered their verdict; it was held, by Judge Story, that this was an irregularity in the officers, but not sufficient to justify the court in setting aside a verdict and granting a new trial, or treating the matter as a mistrial.¹ But where the jury, on their own motion, obtain, after they retire, a report of the judge's charge, which they use to guide their deliberations, this, as has been seen, has been held ground to set aside a verdict of conviction.² But it has been ruled that the mere fact of a jury becoming possessed, after retiring, of an accurate newspaper report of the evidence, without any comments thereon, is not ground to set aside the verdict;³ though it is otherwise when the report is imperfect,⁴ or when the paper received is a review of the case.⁵ And it is not ground for a reversal that a report of the evidence at the coroner's inquest was in the jury-room, it not appearing that they read it.⁶

§ 1770. — SO OF IRREGULAR COMMUNICATION OF COURT. It is irregular even for the trial judge, after the jury have retired, to confer with them except in the presence of the parties; and if any communication is so made by him to them, in any way calculated to prejudice the defendant, this will avoid the verdict.¹ Whatever, as to the merits,

In *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799, it was held that permission to the jury to receive sealed letters was ground for new trial.

¹ *United States v. Gibert*, 2 Sumn. 19, Fed. Cas. No. 15204.

² *Farrar v. State*, 2 Ohio St. 54.

³ *People v. Gaffney*, 14 Abb. Pr. N. S. (N. Y.) 36, Sheld. 304; affirmed 50 N. Y. 416. See *Gilson v. People*, 4 Park. Cr. Rep. (N. Y.) 619.

⁴ *Walker v. State*, 37 Tex. 366.

⁵ *Carter v. State*, 77 Tenn. (9 Lea) 440.

⁶ *State v. Harris*, 34 La. Ann. 118.

¹ See, *supra*, § 1483. GA.—*Crawford v. State*, 12 Ga. 142. ILL.—*Fisher v. People*, 23 Ill. 283. IND.—*Hall v. State*, 8 Ind. 439. IOWA.—*O'Connor v. Guthrie*, 11 Iowa 180. LA.—*State v. Frisby*, 19 La. Ann. 143. MASS.—*Sargent v. Roberts*, 18 Mass. (1 Pick.) 337, 11 Am. Dec. 185; *Com. v. Ricketson*, 46

passes from the judge to the jury, should be in the presence of the parties, open to their correction at the time, and to exception, so that it may be open to a revisory court. It has therefore been held that the sending in by the judge of a prior written charge to a grand jury will avoid the verdict;² and the same result was reached where the judge, after the jury had retired, and had declared that they were unable to agree, told the jury that the case was a peculiar one, and that he had reason to believe they

Mass. (5 Met.) 412. MINN.—Hoberg v. State, 3 Minn. 262. MO.—State v. Alexander, 66 Mo. 148. N. Y.—Plunkett v. Appleton, 41 N. Y. Super. Ct. (6 Jones & S.) 159; affirmed 51 How. Pr. 469. TENN.—Witt v. State, 45 Tenn. (5 Cold.) 11. TEX.—Taylor v. State, 42 Tex. 504. WIS.—Havenor v. State, 125 Wis. 444, 4 Ann. Cas. 1052, 104 N. W. 116.

Communication by court to jury, after they have retired to deliberate, not made in open court, and without the knowledge of parties and counsel, is reversible error.—Havenor v. State, 125 Wis. 444, 4 Ann. Cas. 1052, 104 N. W. 116.

See note, 17 L. R. A. (N. S.) 609.

Absence of showing communication sent by judge to the jury had some relation to, or bearing upon, the case, held not to be ground for new trial, in *People v. Kelly*, 31 Hun (N. Y.) 225, 2 N. Y. Cr. Rep. 15.

Communication by judge, from his lodgings, after adjournment, to jury, with consent of counsel, notifying the jury that the court would meet them at a stated hour, is not error.—*Rafferty v. People*, 72 Ill. 37.

Conversation by court with juror, after retirement, in regard

to the case, is reversible error. See *State v. Alexander*, 66 Mo. 148; *Watertown Bank & Loan Co. v. Mix*, 55 N. Y. 558.

Written communication by court to jury after they have retired, without the express consent of the parties, is reversible error.—*Plunkett v. Appleton*, 41 N. Y. Sup. Ct. (6 Jones & S.) 159; affirmed, 51 How. Pr. 469. See *State v. Alexander*, 66 Mo. 148; *Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 558.

Written communication by court to jury after retirement, held not to be ground for new trial where prevailing party chargeable with no wrong and no injury could thereby result to the defeated party.—*State v. Borchert*, 68 Kan. 360, 74 Pac. 1108.

² *Holton v. State*, 2 Fla. 476. Judge Edmonds, on a trial for murder, sent word to a jury, who had applied to him for a law book on manslaughter, that they "had nothing to do with manslaughter." This was communicated to them by the officer in the absence of counsel, but was held not sufficient ground for a new trial.

But see *People v. Carnal*, 1 Park. Cr. Rep. (N. Y.) 256, 262, 676; *People v. Carnal*, 2 Park. Cr. Rep. (N. Y.) 777-779.

had been tampered with;³ and where, as we have seen, the jury obtained possession of a fragment of a newspaper containing the charge or part of the charge of the judge on the issue before them.⁴ It has also been held ground for new trial that the court took testimony, in the presence of the jury, on preliminary questions calculated to prejudice the defendant;⁵ or ordered during the trial arrest of defendant's witnesses for perjury.⁶ It is not, however, ground to set aside the verdict that the judge, in presence of counsel on both sides, charged the jury a second time upon matters of evidence, after they returned to court, stating they could not agree, but without request for further instructions;⁷ and so where, after the jury had retired to consult on their verdict they sent a note in writing to the court, in absence of parties and counsel, requesting advice on certain points in the case, and the judge returned the writing without reply, and directed the officer to hand a volume of reports to the foreman, and to request him to read a part of a decision, to the effect that a jury in such circumstances could not communicate with the judge except in open court;⁸ and so where the judge, in answer to a note from a jurymen, gave an answer not calculated to prejudice the defendant;⁹ and where the evidence merely was that the judge received a note from the jury which he answered, there being no proof of the contents of the note or answer.¹⁰ And a new trial was refused when the court, after the jury had returned for instructions, read evidence to them in the absence of the prisoner and his counsel;¹¹ and where,

³ State v. Ladd, 10 La. Ann. 271.

⁴ Farrar v. State, 2 Ohio St. 54.

In Florida, it is held not to be error to permit the jury to take out the whole (otherwise as to part) of the written charge of the court.—Dixon v. State, 13 Fla. 636.

⁵ Hull v. State, 65 Ga. 36.

⁶ Burke v. State, 66 Ga. 157.

⁷ Crawford v. State, 12 Ga. 142;

Com. v. Snelling, 32 Mass. (15 Pick.) 321; State v. Connolly, 7 Mo. App. 40.

⁸ Com. v. Jenkins, Thach. C. C. (Mass.) 118.

⁹ Doyle v. United States, 11 Biss. 100, 10 Fed. 269.

¹⁰ People v. Keeley, 44 N. Y. 526.

¹¹ Jackson v. Com., 60 Va. (19 Gratt.) 656.

under similar circumstances, the judge, in presence of the defendant but in the absence of defendant's counsel, made to the jury a statement not touching the merits.¹² But such precedents should not be extended so as to permit an opinion bearing on the merits to be given by the judge to the jury in the absence of the defendant.¹³

§ 1771. — So OF CONVERSING WITH OTHERS AS TO CASE AND RECEPTION OF INFORMATION AS TO THE CASE. It is well settled that if a jury, after they are sworn in a case, and before its sealing for rendition, hear other testimony than that rendered in the case, or converse with strangers on the subject of the case, it will vitiate the whole procedure.¹ But overhearing by the jury of the casual remark of a bystander as to the merits is not ground for a new trial.² Nor does overhearing any conversation after the verdict has been rendered but before discharge, vitiate.³

Contra: *Wade v. State*, 12 Ga. 25.
12 *State v. Pike*, 65 Me. 111.

Compare: *People v. Cessiano*, 31 Hun (N. Y.) 388, 1 N. Y. Cr. Rep. 505; *Hunnicut v. State*, 18 Tex. App. 523.

¹² *Supra*, § 1483; *State v. Davenport*, 33 La. Ann. 231.

¹ *Knight v. Freeport*, 13 Mass. 218; *Perkins v. Knight*, 2 N. H. 474; *State v. Tilghman*, 33 N. C. (11 Ired. L.) 513; *State v. Noblett*, 42 N. C. (2 Jones L.) 418; *Hudson v. State*, 17 Tenn. (9 Yerg.) 408; *infra*, § 1791.

As to English practice, see *R. v. Martin*, L. R. 1 C. C. 378; and see, *supra*, §§ 1656-1664.

² *People v. Reavy*, 45 Hun (N. Y.) 418; *Brake v. State*, 63 Tenn. (4 Baxt.) 161.

³ *James v. State*, 55 Miss. 57, 30 Am. Rep. 496.

Visiting of the jury by a stranger, with reasonable refresh-

ments, under the supervision of the officer in charge, does not vitiate the verdict, no conversation as to the case having taken place. — *Com. v. Roby*, 29 Mass. (12 Pick.) 496.

Medical witness for the Commonwealth, being accidentally present at the hotel when the jury were brought there by the sheriff to be lodged for the night, invited the jury, in the presence of the sheriff, to drink with him, and some of them accepted the invitation, it was ruled that as this act was inadvertent, but intended only as an act of courtesy, and as it was all in the presence of the sheriff, it was not sufficient to set aside the verdict.—*Thompson's Case*, 49 Va. (8 Gratt.) 638.

Nor is it any ground for a new trial that the jury passed through crowds of people going to the hotel where they dined, or that

§ 1772. — So OF PRESENCE OF PARTY. It is sufficient ground for a new trial that a party interested in the prosecution visited the jury during their deliberations.¹ Thus, where it appeared that the prosecutor had been in the room with the jury during their deliberations, it was held ground for new trial, though he was acting officially as high sheriff, and though there was no misconduct shown.² But this is not to be stretched so far as to require a new trial, because one of the deputy sheriffs, having charge of the jury, has been called as a witness in the case.³ Where, however, a part of the jury were permitted to take their meals with some of the witnesses of the prosecution, no officer being present, this was held to vitiate the verdict.⁴

§ 1773. — So OF TESTIMONY SUBMITTED BY JUROR OR OTHERS. If any testimony material to the issue be acted on by the jury, without having been previously submitted in evidence, but be communicated to the jury by one of their number, it will avoid the verdict.¹ Thus, verdicts have been set aside where an unsworn bystander, during the trial, stated to one of the jury that the testimony of a witness under examination was true,² and where the sheriff handed to the jury, while deliberating, loose papers

they dined at the public table at the hotel, under the charge of their officer, no one speaking to or tampering with them.—Jumpertz v. People, 21 Ill. 275; Adams v. People, 47 Ill. 376; Browning v. State, 33 Miss. 47; Howe v. State, 20 Tenn. (1 Humph.) 491.

¹ See Love v. State, 65 Tenn. (6 Baxt.) 154; Odle v. State, 65 Tenn. (6 Baxt.) 159.

² McElrath v. State, 32 Tenn. (2 Swan) 378.

³ Reed v. Com., 63 Va. (22 Gratt.) 924.

Compare: State v. Snyder, 20 Kan. 306, cited, *supra*, § 1766.

⁴ Odle v. State, 65 Tenn. (6 Baxt.) 150.

Compare: Wilson v. State, 65 Tenn. (6 Baxt.) 206.

¹ N. J.—State v. Powell, 7 N. J. L. (2 Halst.) 244. OHIO—Kent v. State, 42 Ohio St. 426. PA.—Howser v. Com., 51 Pa. St. 332. TENN.—Sam v. State, 31 Tenn. (1 Swan) 61; Morton v. State, 69 Tenn. (1 Lea) 498. TEX.—Anschicks v. State, 6 Tex. App. 524. ENG.—R. v. Rosser, 7 Car. & P. 648, 32 Eng. C. L. 803; R. v. Sutton, 1 Maule & Sel. 532, 541; R. v. Heath, 18 How. St. Tr. 123.

² Dempsey v. People, 47 Ill. 323.

purporting to be the evidence in the case, not knowing what the papers consisted of.³ But it does not follow that a new trial will be ordered because the jury take into consideration general knowledge of the character of the transaction. Thus, in an indictment for a seditious libel, tending to excite public outrages, the judge referred to the personal knowledge of the jury for proof of the fact that serious riots had for some time back been occurring in the particular neighborhood, and it was held that such a reference was right, such riot forming part of the history of the country;⁴ and where one of the jury communicated to his fellows mere opinions as to witnesses in the case, this has been ruled to be no ground for a new trial.⁵ But the case is different where the issue is affected by the irregular submission, by one juror to the others, of material facts, connected with the merits.⁶ Thus, where one of the jurymen stated to his fellows, after they had retired, that he had heard a witness, whose credibility was attacked at the trial, sworn before the grand jury, and that his statement was the same as he had made on the trial, and it appeared that this statement had much influence in producing the verdict of guilty, it was held that this proceeding was illegal, and vitiated the verdict.⁷ How far jurors are admissible to prove such misconduct is hereafter discussed.⁸

§ 1774. —So OF VISITING SCENE OF OFFENSE. Visiting the scene of the *res gestæ*, by a part of a jury, under an officer's charge, after the case is committed to them, is

³ *Pound v. State*, 43 Ga. 88.

⁴ *R. v. Sutton*, 4 Maule & Sel. 532, 105 Eng. Repr. 774.

⁵ See *Purinton v. Humphreys*, 6 Me. (6 Greenl.) 379; *Nolen v. State*, 39 Tenn. (2 Head.) 520; *Price v. Warren*, 11 Va. (1 Hen. & M.) 385.

⁶ *Talmadge v. Northrop*, 1 Root (Conn.) 522; *State v. Andrews*, 29

Conn. 100, 76 Am. Dec. 593; *Martin v. State*, 25 Ga. 494.

Independent investigations of juror out of court, ground for setting verdict aside.—*Aldrich v. Westmore*, 52 Minn. 164, 53 N. W. 1072.

⁷ *Donston v. State*, 25 Tenn. (6 Humph.) 275.

⁸ *Infra*, § 1787.

ground for a new trial.¹ It is otherwise, however, if the visit is merely casual, and without influence on the jury,²—e. g., as where the jury, when taking exercise under the custody of an officer, walk by such scene.³

§ 1775. — BUT NOT ACCIDENTAL OR NECESSARY VISIT OF STRANGER. The inadvertent or necessary intrusion of strangers will not be cause for a new trial, unless coupled with proof of communication made as to the case under trial.¹ A fortiori is this the case when the visitor is a qualified officer, present casually, though unsworn as to the particular issue; no interference being proved.² Nor is it ground for new trial that the jury were left for a short time unattended, no intrusion by other persons being shown,³ or that they took meals in the house of one interested in the case, there being no communication as to the case,⁴ or that a juror, with permission of court, went out with an officer to consult a physician.⁵ But

¹ *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y.) 25; affirmed, 14 N. Y. 562; *Ruloff v. People*, 18 N. Y. 179.

As to formal view, see, *supra*, § 1642.

As to visit of scene and investigation by a single juror, see *Aldrich v. Westmore*, 52 Minn. 164, 53 N. W. 72.

² See *People v. Hope*, 62 Cal. 291; *State v. Adams*, 20 Kan. 311; *State v. Brown*, 64 Mo. 368.

³ *Ibid.* *Luck v. State*, 96 Ind. 63.

¹ *Supra*, § 1771. *State v. Degonia*, 69 Mo. 485; *Hair v. State*, 16 Neb. 501, 21 N. W. 464; *Luster v. State*, 30 Tenn. (11 Humph.) 169; but see *Love v. State*, 65 Tenn. (6 Baxt.) 154.

² *Supra*, §§ 1664, 1760 et seq.; *Kirk v. State*, 73 Ga. 620; *Trim v. Com.*, 59 Va. (18 Gratt.) 983, 98 Am. Dec. 765.

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Physician called in to visit a juror who was seriously ill, in a capital case, after the jury had the case committed to them, is not by itself ground for reversal, the conversation between them being exclusively as to the juror's illness.—*Goersen v. Com.*, 106 Pa. St. 477, 51 Am. Rep. 534.

Presence of barber in jury room, at juror's request, and with consent of the attorneys, is not ground for a new trial in a murder case.—*Com. v. Lombardi*, 221 Pa. St. 31, 70 Atl. 122.

³ *People v. Kelly*, 46 Cal. 355; *State v. Turner*, 25 La. Ann. 573.

As to misconduct of jury other than their separation, for which new trial may be had, see note, 134 Am. St. Rep. 1041.

⁴ *Dumas v. State*, 63 Ga. 600.

⁵ *State v. Vines*, 34 La. Ann. 1073.

where, on a trial for an assault with intent to kill, a person who was concerned in the "fight," of which the assault was part, was permitted to "fiddle for the jury" at their request, during their deliberations, this, though there was no conversation on the subject of the trial, was held ground for a new trial.⁶

§ 1776. — — — NOR CASUAL EXHIBITION OF EVIDENCE. It may happen that instruments of evidence may inadvertently be seen by the jury, or remarks overheard by them, not, however, through any design on the part of the prosecution to obtain an unfair advantage, or with any effect on the jury. If on such grounds verdicts should be set aside, few verdicts would stand. In such cases, therefore, the information being communicated casually, and no effect on the jury being produced, sufficient ground for a new trial is not laid. Thus, where during the trial and before verdict inadvertent remarks to the prejudice of the defendant are made by strangers in the hearing of jurymen, this will not operate to disturb the verdict if it be shown that such remarks were not promoted by the prosecution, or voluntarily entertained and weighed by the jurymen.¹ The same rule has been applied to the casual exhibition of a material paper,² and to other fortuitous exhibition of facts bearing on the case, but coming from strangers, and not influencing the result.³ And there is

⁶ State v. Cartright, 20 W. Va. 32.

¹ State v. Andrews, 29 Conn. 100, 76 Am. Dec. 593; State v. Ayre, 23 N. H. (3 Fost.) 301; State v. Cucuel, 31 N. J. L. (2 Vr.) 249; Nance v. State, 21 Tex. App. 457, 1 S. W. 448; Hall v. Com., 33 Va. (6 Leigh) 615, 29 Am. Dec. 236.

Placard in jury room, on jury in counterfeiting case entering to deliberate, charging one of their number with being a counterfeiter, is not ground for a new trial.—

Hall v. Com., 33 Va. (6 Leigh) 615, 29 Am. Dec. 236.

² State v. Taylor, 20 Kan. 643. Supra, § 1764.

³ ARK.—Stanton v. State, 13 Ark. (8 Eng.) 319. GA.—Eppes v. State, 19 Ga. 102. IND.—Barlow v. State, 2 Blackf. 114. LA.—State v. Fruge, 28 La. Ann. 657. MISS.—Chase v. State, 46 Miss. 683. N. J.—State v. Cucuel, 31 N. J. L. (2 Vr.) 249, 262. ORE.—State v. Brown, 7 Ore. 186. TENN.—Rowe v. State, 30 Tenn. (11 Humph.)

sound reason for this distinction. If jurors are allowed voluntarily to receive and weigh evidence not rendered on trial, no case could be decided fairly. On the other hand, if casual remarks as to the case made in the presence of a juror, not in any way influencing him, should require a new trial, no case would be decided at all; for there is no case in which one of the parties could not manage to have such remarks made.⁴

§ 1777. — — — AND SO OF THE MERE APPROACH OF STRANGERS, AND TRIVIAL CONVERSATION. It is at all events clear that, as a general rule, the accidental approach of strangers, and collateral communication with them, unless improper conversation as to the case is entertained, will not avoid the verdict.¹ Thus, handing five dollars casually to a juror, in payment of a debt, by a bystander, without any reference or connection with the case under trial, is no ground for a new trial.² Nor is the mere fact that the jury were for a short time without attendants fatal.³ And that the jury were taken to divine service during the trial, and heard a sermon on the text "Thou shalt not kill,"

491. TEX. — March v. State, 44 Tex. 64.

As to writ of error in such cases, see State v. Wart, 51 Iowa 587, 2 N. W. 405.

Burglars' tools, found on the defendant, were, during a recess of the court, while the cause was on trial, exhibited, and their use explained in the presence of one of the jurors, with the knowledge of the defendant and his counsel, and no objection was made until after verdict, it was held that the objection was to be regarded as waived. — State v. Rand, 33 N. H. 216.

⁴ People v. McCurdy, 68 Cal. 576, 10 Pac. 207; State v. Cook, 30 Kan. 82, 1 Pac. 32; State v. Nance, 25 S. C. 168; State v. Schnelle, 24 W. Va. 767.

¹ Supra, § 1760. ARK. — Stanton v. State, 13 Ark. (8 Eng.) 317; Coker v. State, 20 Ark. 51. GA. — Doyal v. State, 70 Ga. 134. MISS. — McCann v. State, 17 Miss. (9 Smed. & M.) 465; Ned v. State, 33 Miss. 364. N. C. — State v. Tilghman, 33 N. C. (11 Ired. L.) 513; State v. Baker, 63 N. C. 276. TENN. — Rowe v. State, 30 Tenn. (11 Humph.) 491. TEX. — Nance v. State, 21 Tex. App. 457, 1 S. W. 448. W. VA. — State v. Miller, 24 W. Va. 802; State v. Smith, 24 W. Va. 815; State v. Flanagan, 26 W. Va. 117.

² Martin v. People, 54 Ill. 225.

³ Hoover v. State, 64 Tenn. (5 Baxt.) 672. See Love v. State, 65 Tenn. (6 Baxt.) 154.

does not by itself vitiate the proceedings, there being nothing in the sermon calculated to bias the jury.⁴

§ 1778. — PRESUMPTION AGAINST SUCH COMMUNICATIONS. When, however, a communication, not on its face trivial, is shown to have been made to the jury, during their deliberations, from outside, it will be ground for disturbing the verdict unless it be shown to have in no way touched the merits of the case on trial.¹ Nor can a stranger, even by the action of the court, be permitted to address the jury as to the merits of the pending trial, without throwing on the prosecution the burden of showing that the jury was not thereby influenced.² But the court may appoint a person, in ordering a view by the jury of the premises of the *res gestæ*, to point out and name to the jurors the various localities referred to in the testimony, and described in the order viewed.³

§ 1779. INATTENTION OR IGNORANCE OF JUROR MUST BE EXCEPTED TO AT TIME. The fact that a juror was asleep or otherwise inattentive during the trial is not ground for a new trial, where it could have been a matter of exception at the time and was passed over.¹ Ignorance of the English language, when not known at the time of challenge, is ground for new trial.²

⁴ *Alexander v. Com.*, 105 Pa. St. 1.

¹ See authorities cited, *supra*, § 1777, footnote 4. MISS.—*Pope v. State*, 36 Miss. 122. NEV.—*State v. Anderson*, 4 Nev. 265; *State v. Harris*, 12 Nev. 414. N. Y.—*Hartung v. People*, 4 Park. Cr. Rep. 256, 319, as reversed in 22 N. Y. 95. TEX.—*Defriend v. State*, 22 Tex. App. 570, 2 S. W. 641.

² *People v. Green*, 53 Cal. 60.

³ *People v. Bush*, 71 Cal. 602, 12 Pac. 781; *People v. Milner*, 122 Cal. 171, 54 Pac. 833.

¹ *Cogswell v. State*, 49 Ga. 103; *Baxter v. People*, 8 Ill. (3 Gilm.) 386; *United States v. Boyden*, 1 Low. 266, Fed. Cas. No. 14632.

Burden of proving that there was no influence exercised is on the prosecution.—*Nile v. State*, 79 Tenn. (11 Lea) 694.

² *Com. v. Jones*, 12 Phila. (Pa.) 550.

Compare: *Territory v. Romaine*, 2 N. M. 114; *Bonneville v. State*, 53 Wis. 680, 11 N. W. 427.

As to removal of this objection by employment of an interpreter, see, *supra*, § 1605.

§ 1780. — BUT OTHERWISE AS TO DISOBEDIENCE TO COURT, RESULTING IN INJURY. Cases may occur in which a juror, by his contumacious disregard of the directions of the court, may make a new trial necessary.¹ This has been ruled to be the case where a juror, in disobedience to the repeated directions of the court, took notes of the evidence, which notes he retained.² But the mere taking of notes by a juror, without objection, is no ground for revision.³

§ 1781. INTOXICATION, WHEN GROUND FOR NEW TRIAL. In New York any indulgence in spirituous liquors, during trial, by the old rule, avoided the verdict.¹ "We can not," declared the Supreme Court, "allow jurors thus of their own accord to drink spirituous liquor while thus engaged in the course of a cause. We are satisfied that there has been no mischief, but the rule is absolute, and does not meddle with consequences, nor should exceptions be multiplied. We have set aside verdicts in error for this cause, where the parties consented that the jury should drink."² This, however, is no longer held in New York,³ though in other states verdicts have been set aside because spirituous liquor was given to the jury during their delibera-

¹ See, *supra*, § 1652.

² *Cheek v. State*, 35 Ind. 492. See, *post*, § 1902.

³ *Cluck v. State*, 40 Ind. 263.

¹ *Dennison v. Collins*, 1 Cow. (N. Y.) 111; *Rose v. Smith*, 4 Cow. (N. Y.) 17, 15 Am. Dec. 331.

² *Brant v. Fowler*, 7 Cow. (N. Y.) 562.

Drinking by jurors while deliberating, ground for reversal, though successful party not responsible therefor. — *Hanrahan v. Ayres*, 10 Misc. 435, 31 N. Y. Supp. 458.

Frequent drinking during all-

night disagreement, vitiates verdict found at noon on the next day.—*Patrick v. Victor Knitting Mills Co.*, 37 App. Div. 7, 55 N. Y. Supp. 340.

³ *Wilson v. Abrahams*, 1 Hill (N. Y.) 207.

The authority of *Wilson v. Abrahams* seems to be overthrown, and the doctrine of the earlier New York cases re-established. See, among moderately recent New York cases, *Patrick v. Victor Knitting Mills Co.*, 37 App. Div. 7, 55 N. Y. Supp. 340, and *Hanrahan v. Ayres*, 10 Misc. 435, 31 N. Y. Supp. 458.

tion.⁴ On the other hand, Judge Story, in a capital case, held it would not avoid a verdict to show that some of the jurors drank ardent spirits during the trial, when the prisoner's counsel consented in open court to this indulgence to those whose health might require it, unless it was also shown that the indulgence was grossly abused and operated injuriously to the defendant;⁵ and this view is

4 ARK.—*Pelham v. Page*, 6 Ark. 535; *Myers v. State*, 111 Ark. 399, L. R. A. 1915C, 302, 163 S. W. 1177. CAL.—*People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549. IND.—*Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760. IOWA—*State v. Baldy*, 17 Iowa 39; *Ryan v. Harrow*, 27 Iowa 494, 1 Am. Rep. 302. N. H.—*State v. Bulard*, 16 N. H. 139. TEX.—*Jones v. State*, 13 Tex. 166. W. VA.—*State v. Greer*, 22 W. Va. 800.

See *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549, a case in which large quantities of beer and whiskey were sent to the jury without permission of court or knowledge of defendant, but there was no proof of drunkenness.

Compare: *State v. McLaughlin*, 44 Iowa 82; *Williamson v. Reddish*, 45 Iowa 550; *State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403, overruling *State v. Baldy*, 17 Iowa 39.

Circulating spirituous liquors among jurors, even with the consent of the parties, said to be ground for a reversal, in *Pelham v. Page*, 6 Ark. 535.

• Use of intoxicating liquors before submission of the case to the jury, not ground for a new trial.—*State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403.

Drinking by jurors must be sufficient to incapacitate, or defendant party must be injured thereby, before the act will furnish ground

for reversal.—*Richardson v. Jones*, 1 Nev. 405. See *Perry v. Bailey*, 12 Kan. 546; *State v. Jones*, 7 Nev. 414.

Use of liquor not influencing verdict of jury, courts will not disturb the verdict.—*Arizona Copper Co. v. Copper Queen Min. Co.*, 2 Ariz. 15, 7 Pac. 720; *Dolan v. State*, 40 Ark. 475; *Jones v. People*, 6 Colo. 463, 45 Am. Rep. 526; *State v. Greer*, 22 W. Va. 827.

As to the drinking of liquors not being sufficient, in and of itself, to vitiate a verdict, see note, 35 Am. Dec. 258.

As to what indulgence in use of intoxicating liquors incapacitates juror for performance of his duties and vitiates the verdict, see note, L. R. A. 1915C, 309.

Six and one-half quarts of whiskey drunk by ten of the twelve jurors in the space of three and one-half days, is ground for a new trial, although none of them was intoxicated, and the liquor did not influence the verdict.—*Myers v. State*, 111 Ark. 399, L. R. A. 1915C, 302, 163 S. W. 1177.

⁵ In *United States v. Gilbert*, 2 Sumn. 21, Fed. Cas. No. 15315.

Same principle applied in *Dolan v. State*, 40 Ark. 454; *Stone v. State*, 23 Tenn. (4 Humph.) 37; *Coleman v. Moody*, 14 Va. (4 Hen. & M.) 1; *State v. Greer*, 22 W. Va. 803.

now generally accepted,⁶ and with good reason, since there are many men, fully capable to act as jurors, who, from old age or other reasons, are dependent for their health on a moderate use of tonics of this class.⁷ It is agreed, however, that incapacitating intoxication by any of the jury during their deliberations is ground for setting aside the verdict.⁸ And it has been held in Ohio, that the separation of a juror from his fellows, after the case has been finally submitted and before they have agreed upon a verdict, for the purpose of obtaining and drinking intoxicating liquors, when not explained or shown to be excusable, is such misconduct of the juror as will entitle the prisoner to a new trial.⁹

§ 1782. CASTING LOTS BY JURORS, OR OTHER IRREGULARITY IN THEIR CONSULTATIONS. Where the jury have cast lots, or resorted to chance in any way whatever, to determine their verdict, a new trial will be ordered in all cases in which the jurors bound themselves, before the lot, to

"Cider" is, at all events, unexceptionable.—*Com. v. Roby*, 29 *Mass.* (12 Pick.) 496. See note in 21 *Alb. L. J.* 40.

⁶ *ARK.*—*Kee v. State*, 28 *Ark.* 155. *COLO.*—*Jones v. People*, 6 *Colo.* 452, 45 *Am. Rep.* 526. *ILL.*—*Davis v. People*, 19 *Ill.* 74. *IND.*—*Creek v. State*, 24 *Ind.* 151. *IOWA*—*State v. Bruce*, 48 *Iowa* 530, 30 *Am. Rep.* 403. *LA.*—*State v. Caulfield*, 23 *La. Ann.* 148. *MASS.*—*Nichols v. Nichols*, 138 *Mass.* 256 (citing text). *MISS.*—*Pope v. State*, 36 *Miss.* 121; *Russell v. State*, 53 *Miss.* 368; *Green v. State*, 59 *Miss.* 501. *MO.*—*State v. Upton*, 20 *Mo.* 397; *State v. West*, 69 *Mo.* 401, 33 *Am. Rep.* 506. *NEV.*—*State v. Jones*, 7 *Nev.* 408, 414. *N. J.*—*State v. Cucuel*, 31 *N. J. L.* (2 Vr.) 549. *TENN.*—*Joyce v. State*, 66 *Tenn.* (7 *Baxt.*) 273.

TEX.—*Tuttle v. State*, 6 *Tex. App.* 556. *VA.*—*Thompson's Case*, 49 *Va.* (8 *Gratt.*) 638. *WIS.*—*Roman v. State*, 41 *Wis.* 312.

In Texas, as to capital cases, see *Jones v. State*, 13 *Tex.* 168.

New trial will be granted, however, if a juror is "treated" by the prosecutor. *Infra*, §§ 1789 et seq. See, *supra*, § 1665; 7 *South. Law Rev.* 526.

⁷ *May v. People*, 8 *Colo.* 210, 6 *Pac.* 816; *State v. Livingston*, 64 *Iowa* 560, 21 *N. W.* 34.

⁸ *Hogshead v. State*, 25 *Tenn.* (6 *Humph.*) 59.

This is conceded in most of the cases cited; and see *Pelham v. Page*, 6 *Ark.* (1 *Eng.*) 535.

See, also, authorities cited in footnote 4, this section.

⁹ *Weis v. State*, 22 *Ohio St.* 486.

abide by the result.¹ Where, however, such a method of determining the views of the particular jurors as to the degree is taken without any previous agreement by which the jurors bind themselves individually to adopt a mean result, but where each juror reserves to himself the right of dissenting, and where all, after consideration, agree to a compromise based on their individual estimates, the finding will rarely be disturbed.² And where one of the jury, through a mistaken sense of duty, thought he ought

¹ ARK.—*Williams v. State*, 66 Ark. 264, 50 S. W. 517. GA.—*Monroe v. State*, 5 Ga. 85. MO.—*State v. Barnstetter*, 65 Mo. 149. TENN.—*Crabtree v. State*, 35 Tenn. (3 Sneed) 302; *Williams v. State*, 83 Tenn. (15 Lea) 129, 54 Am. Rep. 404. TEX.—*Leverett v. State*, 1 Tex. L. J. 113; *Hunter v. State*, 8 Tex. App. 75; *Wood v. State*, 13 Tex. App. 135, 44 Am. Rep. 701; *Sanders v. State*, 45 Tex. Cr. Rep. 518, 108 Am. St. Rep. 973, 78 S. W. 518; *Witty v. State*, (Tex. Cr.) 171 S. W. 229; *Ingram v. State*, (Tex. Cr.) 182 S. W. 290. VA.—*Thompson v. Com.*, 49 Va. (8 Gratt.) 637. WIS.—*Birchard v. Booth*, 4 Wis. 67. ENG.—*Hale v. Cove*, 1 Str. 642, 93 Eng. Repr. 753; *Parr v. Seames*, Barnes 438, 94 Eng. Repr. 993; *Mellish v. Arnold*, Bunb. 51.

See Hilliard on New Trials (1873) 160.

Compare: *Supra*, §§ 1666, 1667; 14 Cent. L. J. 341.

Balloting by jury as to guilt or innocence does not constitute finding a verdict by lot.—*Young v. Com.*, 19 Ky. L. Rep. 929, 42 S. W. 1141.

Deciding by lot held not to be a ground of reversing a verdict of guilty in *McKee v. Com.*, 8 Ky. L.

Rep. 417, 1 S. W. 810, and *Milstead v. Com.*, 21 Ky. L. Rep. 358, 51 S. W. 451.

Determining years of imprisonment, after agreement to a verdict of guilty, by dividing the total of the number of years each juror favored by twelve, the verdict was set aside as having been determined by lot, in *Williams v. State*, 66 Ark. 264, 50 S. W. 517; *Ingram v. State*, (Tex. Cr.) 182 S. W. 290. See *Good v. State*, (Tex. Cr.) 66 S. W. 1099.

Compare: *Keith v. State*, (Tex. Cr.) 56 S. W. 628; *McAnally v. State*, (Tex. Cr.) 57 S. W. 832; *Goodman v. State*, 49 Tex. Cr. Rep. 185, 91 S. W. 795; *Dawson v. State*, (Tex. Cr.) 161 S. W. 469; *Hicks v. State*, (Tex. Cr.) 171 S. W. 755; *Luna v. State*, (Tex. Cr.) 179 S. W. 1152.

—In Kentucky, arriving at verdict in such manner is not ground for reversal under *Crim. Code Prac.*, § 271.—*Choate v. Com.*, 176 Ky. 427, 195 S. W. 1080.

² ILL.—*Cochlin v. People*, 93 Ill. 410. IND.—*Dooley v. State*, 28 Ind. 239; *Batterson v. State*, 63 Ind. 231. TENN.—*Gildewell v. State*, 83 Tenn. (15 Lea) 133. TEX.—*Warren v. State*, 9 Tex. App. 619, 35 Am. Rep. 745; *Leverett v. State*,

to assent to the views of a majority, and thereby concurred in a verdict of murder, such mistake was held no ground for a new trial.³ The same conclusion was reached where the jury concurred in opinion as to the guilt of the prisoner, but differed as to the length of time for which he should be sentenced to the penitentiary; and they agreed that each one should state the time for which he would send him to the penitentiary, and that the aggregate of these periods, divided by twelve, should be the verdict, and after it was done they struck off the odd months, and all agreed to the verdict, understanding what it was.⁴ Nor will mistake by a juror as to the nature of the punishment, nor as to the action of the court, be ordinary ground for revision;⁵ nor is it ground that the juror believed that the sentence would be commuted, or the defendant promptly pardoned.⁶

¹ Tex. L. J. 118; *Goodman v. State*, 49 Tex. Cr. Rep. 185, 91 S. W. 795; *McAnally v. State*, (Tex. Cr.) 57 S. W. 832. VA.—*Thompson v. Com.*, 49 Va. (8 Gratt.) 637.

Fixing fine and imprisonment, pursuant to an agreement, by adding the amount of fine and term of imprisonment each juror thought proper, and dividing the totals by twelve, is improper, even though the jury is not bound by such agreement, and the verdict, after such addition and division, is changed in some trifling respects, and the verdict will be set aside.—*Good v. State*, (Tex. Cr.) 66 S. W. 1099; *Magill v. State*, (Tex. Cr.) 67 S. W. 1018.

Compare: *McAnally v. State*, (Tex. Cr.) 57 S. W. 832.

³ *Com. v. Drew*, 4 Mass. 391. See *Galvin v. State*, 46 Tenn. (6 Cold.) 283.

⁴ *Thompson v. Com.*, 49 Va. (8 Gratt.) 638.

⁵ *State v. McConkey*, 49 Iowa 499; *State v. Shock*, 68 Mo. 552.

⁶ *State v. Rhea*, 25 Kan. 576; *State v. Wallman*, 31 La. Ann. 176; *State v. Turner*, 65 Tenn. (6 Baxt.) 201; *Montgomery v. State*, 13 Tex. App. 74.

A juror not being satisfied of the guilt of the prisoner, but assented to a verdict of guilty under an impression (suggested by his fellow-jurors) that the governor would pardon the defendant if the jury by their verdict recommended it; it was held, in Tennessee, that this was sufficient cause to set aside the verdict.—*Crawford v. State*, 10 Tenn. (2 Yerg.) 60, 24 Am. Dec. 467.

A juror's affidavit that he believed the prisoner was innocent, and that he assented to a verdict of guilty under the belief, induced by the assertions of his fellow-jurors, that there were fatal defects in the proceedings which

§ 1783. — OTHERWISE AS TO MERE COLLATERAL INDECORUM. Mere collateral indecorum on the part of the jury will be no ground to set aside a verdict, unless it appeared that such levity interfered with their deliberations.¹ And it has been held in Colorado that the fact that a jury were allowed to attend a "theatrical exhibition" by leave of court after being impaneled, they being under the charge of a sworn officer, is no ground for a new trial, they not communicating with any one out of their own body, nor being shown to have been in any way influenced by the diversion.²

§ 1784. ABSOLUTE PREADJUDICATION BY JUROR GROUND FOR NEW TRIAL WHEN A SURPRISE. When it appears after trial that a juror had beforehand prejudged the case, but had improperly withheld this fact before acceptance, or when asked as to opinion on voir dire had given false answers, and such formation of opinion was unknown to the party at the time, a new trial will be granted.¹ And

would prevent the prisoner from being sent to the penitentiary, and that the governor would pardon the defendant if recommended to mercy in the verdict, was held in the same state sufficient to set aside the verdict. — *Cochran v. State*, 26 Tenn. (7 Humph.) 544, referring to and approving the case of *Crawford v. State*, 10 Tenn. (2 Yerg.) 60, 24 Am. Dec. 467.

And so where the juror's affidavit was that he yielded against his judgment and conscience, because a great majority of the jury favored the verdict. — *Galvin v. State*, 46 Tenn. (6 Cold.) 283.

But these cases can not be sustained without making jury trials inoperative in all cases of serious disagreement between jurors. *Infra*, § 1787.

¹ *Com. v. Beale*, Phila. (Pa.)

1854, citing *Com. v. Flanigan*, 7 Watts & S. (Pa.) 421; *Jack v. State*, 20 Tex. App. 656.

Compare: *Taylor v. California Stage Co.*, 6 Cal. 228; *Jim v. State*, 23 Tenn. (4 Humph.) 289.

As to irregular action of jury in experimenting with alleged instruments of crime, see 1 Whart. Cr. Ev. (Hilton's ed.), § 314.

² *Jones v. People*, 6 Cal. 452.

¹ GA.—*Wade v. State*, 12 Ga. 25; *Ray v. State*, 15 Ga. 223; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *Burroughs v. State*, 33 Ga. 403; *Moncrieff v. State*, 59 Ga. 470. ILL.—*Sellers v. People*, 4 Ill. (3 Scam.) 412. IND.—*Barlow v. State*, 2 Blackf. 114; *Romaine v. State*, 7 Ind. 63. IOWA.—*State v. Gillick*, 7 Iowa 289. KY.—*Presbury v. Com.*, 39 Ky. (9 Dana) 263. LA.—*State v. Parks*, 21 La. Ann. 251.

it was held a sufficient reason for a new trial that one of the jurors, some time before the trial, declared "such a man as Fries (the defendant) ought to be hung, who brings on such a disturbance," of which fact, until after the trial, the defendant had no notice.² The same ruling

MISS.—Cody v. State, 4 Miss. (3 How.) 27; Cannon v. State, 27 Miss. 147; Lamar v. State, 64 Miss. 687, 2 So. 12. MO.—Lisle v. State, 6 Mo. 426; State v. Taylor, 64 Mo. 358; State v. Gonce, 87 Mo. 627. N. Y.—People v. Bodine, 1 Den. 281; People v. Vermilyea, 7 Cow. 108. N. C.—State v. Duncan, 28 N. C. (6 Ired. L.) 98; State v. Patrick, 48 N. C. (3 Jones L.) 443; State v. Davis, 80 N. C. 412; State v. Lambert, 93 N. C. 619. OHIO.—Parks v. State, 4 Ohio St. 234. S. C.—State v. Hopkins, 1 Bay L. 373. TENN.—Norfleet v. State, 36 Tenn. (4 Sneed) 340. TEX.—Henrie v. State, 41 Tex. 573; Austin v. State, 42 Tex. 355; Long v. State, 10 Tex. App. 186. VA.—Com. v. Jones, 28 Va. (1 Leigh) 598; Heath v. Com., 40 Va. (1 Rob.) 735. W. VA.—State v. McDonald, 9 W. Va. 456; State v. Strauder, 11 W. Va. 745, 27 Am. Rep. 606. FED.—United States v. Fries, 1 Whart. St. Tr. 458, Fed. Cas. No. 5126.

Hilliard on New Trials (1873) 174, 175; and see, for other cases, *infra*, § 1786.

This is eminently the case when the juror procured himself to be fraudulently inserted in the panel.—State v. Bell, 81 N. C. 591; *supra*, § 1431.

As to challenges, see, *supra*, §§ 611 et seq.

Juror expressing opinion, during the progress of the cause, after the

evidence was opened, as to the guilt of the defendant, in the hearing of bystanders, it was held that though in so doing he was guilty of gross misconduct, it was no cause to set aside the verdict.—Com. v. Gallagher, 4 Pa. L. J. 512, 2 Clark (Pa.) 297. See State v. Ayer, 23 N. H. (3 Fost.) 301; Brakefield v. State, 33 Tenn. (1 Sneed) 215.

If prisoner has neglected to avail himself of any of the means provided by law, before trial, for ascertaining the incompetency of a juror, on account of prejudice, he will not be entitled to a new trial on the ground of such prejudice.—Meyer v. State, 19 Ark. 156; State v. Anderson, 4 Nev. 265; State v. Daniels, 44 N. H. 383.

In Connecticut, it is enough if defendant's counsel knew of the incapacity.—State v. Tuller, 34 Conn. 280.

For a less stringent rule, see Willis v. People, 32 N. Y. 715; Heath v. Com., 40 Va. (1 Rob.) 735.

As to discharging jury upon discovery, during trial, of such prejudice or incompetency, see, *supra*, §§ 1446, 1661.

—Such motion can be made in the trial court even after the appellate court had overruled exceptions of record. See State v. Gilman, 70 Me. 329.

² United States v. Fries, 1 Whart. St. Tr. 458, Fed. Cas. No.

under the same limitations took place where the foreman had declared that the plaintiff should never have a verdict, whatever witnesses he produced;³ and where a juror had stated on the morning of trial that he had come from home for the purpose of hanging every counterfeiting rascal, and that he was determined to hang the prisoner at all events.⁴ A qualified opinion, however, dependent on a particular state of facts, will be no ground for new trial;⁵ and where a juror stated that if it was true that the prisoner had made the attempt to commit the crime charged upon him, he would go to the penitentiary, it was held sufficient ground was not laid.⁶ The defendant, also, by omitting to examine the jurymen as to bias, ordinarily is precluded from taking subsequent exceptions.⁷ And a new trial will not be granted because of vague opinions against the prisoner existing in the mind of a juror;⁸

5126. See *Hoard v. State*, 83 Tenn. (15 Lea) 318; *State v. Williams*, 14 W. Va. 851.

Whether juror was so prejudiced is a question of fact to be determined by the court.—*Dumas v. State*, 63 Ga. 600.

That the juror can be examined as to such bias, see, *infra*, § 1787, and *Rader v. State*, 73 Tenn. (5 Lea) 610.

³ 2 Salk. 645.

⁴ *State v. Hopkins*, 1 Bay L. (S. C.) 373. See *ibid.* 377.

⁵ *Mitchum v. State*, 11 Ga. 616; *Anderson v. State*, 14 Ga. 709; *Jim v. State*, 15 Ga. 535; *O'Shields v. State*, 55 Ga. 656. ME.—*State v. Benner*, 64 Me. 267. MO.—*State v. Davis*, 20 Mo. 391. N. H.—*State v. Ayer*, 28 N. H. (8 Fost.) 301. PA.—*Com. v. Flanagan*, 7 Watts & S. 415, 421. TENN.—*Howerton v. State*, 19 Tenn. (1 Meigs) 262. TEX.—*State v. Ward*, 14 Tex. App. 673. VT.—*State v. Hayden*, 51 Vt.

296. VA.—*Poore v. Com.*, 4 Va. (2 Va. Cas.) 474; *Kennedy v. Com.*, 4 Va. (2 Va. Cas.) 510; *Brown v. Com.*, 4 Va. (2 Va. Cas.) 516; *Com. v. Hughes*, 26 Va. (5 Rand.) 655.

⁶ *Kennedy v. State*, 4 Va. (2 Va. Cas.) 510.

Under the California statute, the objection must be made before verdict.—*People v. Fair*, 43 Cal. 137; *People v. Mortimer*, 46 Cal. 114, overruling *People v. Plummer*, 9 Cal. 298.

⁷ *Ibid.*; *State v. Marks*, 15 Nev. 33; *Yanez v. State*, 6 Tex. App. 429, 32 Am. Rep. 591; see, *infra*, § 1785.

⁸ CAL.—*People v. King*, 27 Cal. 507, 87 Am. Dec. 95. GA.—*Wright v. State*, 18 Ga. 383. ILL.—*Hughes v. People*, 116 Ill. 330, 6 N. E. 55. IND.—*Rice v. State*, 7 Ind. 332. N. H.—*State v. Howard*, 17 N. H. 171. N. J.—*State v. Fox*, 25 N. J. L. (1 Dutch) 566. PA.—*Com. v. Flan-*

nor because of prior loose talk by a juror showing prejudice in matters collateral;⁹ nor because of off-hand remarks made by the juror in order to avoid service;¹⁰ nor because of a general excitement against the defendant at the time of trial, in the community at large.¹¹ In such cases, however, a new trial will not be granted unless the reception of the juror was prejudicial to the defendant.¹² Any unfair bias on part of the judge, which is prejudicial to the defendant, is ground for revision.¹³

Error of court on allowance or rejection of challenges belongs to a distinct branch of law previously discussed.¹⁴

§ 1785. — OTHERWISE WHEN PARTY COULD HAVE KNOWN OF PREJUDICE IN TIME TO CHALLENGE. A new trial will not be granted on the ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge, and knew, or might have known, in the exercise of due care, the facts beforehand.¹

agan, 7 Watts & S. 422. VA.—Poore v. Com., 4 Va. (2 Va. Cas.) 474.

⁹ State v. Hayden, 51 Vt. 296.

¹⁰ Simms v. State, 8 Tex. App. 230.

¹¹ Com. v. Flanagan, 7 Watts & S. (Pa.) 422; though if such excitement pervade the jury-box, and work an unjust result, the verdict should be set aside.—People v. Acosta, 10 Cal. 195.

¹² State v. Bancroft, 22 Kan. 170; State v. Williams, 14 W. Va. 851.

¹³ Supra, §§ 1538, 1737.

¹⁴ Supra, §§ 1538 et seq.

¹ ALA.—McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180. ARK.—State v. Casat, 40 Ark. 511. GA.—Moon v. State, 68 Ga. 678; Durham v. State, 70 Ga. 264. IND.—Achey v. State, 64 Ind. 56. ME.—State v. Bowden, 71 Me. 89.

MISS.—George v. State, 39 Miss. 570; Brown v. State, 60 Miss. 447; Harris v. State, 61 Miss. 304; Wood v. State, 62 Miss. 220. MO.—State v. Taylor, 64 Mo. 358; State v. Wood, 74 Mo. 253. NEB.—Ogden v. State, 13 Neb. 436, 14 N. W. 165. N. C.—State v. Underwood, 28 N. C. (6 Ired. L.) 96. TEX.—Givens v. State, 6 Tex. 344; Baker v. State, 4 Tex. App. 243; Yanez v. State, 6 Tex. App. 429, 32 Am. Rep. 591. ENG.—R. v. Sutton, 8 Barn. & C. 417, 15 Eng. C. L. 208, 2 Man. & Ry. 406.

See, also, cases cited, supra, § 1784.

Bystanders called as jurors in a capital case, and, at the instance of the prisoner, sworn and examined touching their indifference, and then elected by the prisoner and sworn of the jury; upon objections to the indifference of

§ 1786. **ABSOLUTE INCAPACITY OF JUROR GROUND FOR NEW TRIAL, BUT NOT QUALIFIED.** Where it turns out after verdict that one of the jurors was absolutely incapable of acting as such, and that this fact was unknown to the defendant at the time, and could not, with due diligence, have been known to him, this is a ground for a new trial. This has been held in a case where it appeared that one of the jurors was not a freeholder, this being a statutory necessity;¹ or was an infant;² or was not the person actually summoned on the jury, though bearing the same name.³ But disqualifications not absolute, which are ground for challenge, may not be ground for a new trial.⁴ This is the case with alienage,⁵ when such alienage is not a statutory disqualification;⁶ with conviction years back

these jurors, discovered after the trial, not inconsistent with what was disclosed by the jurors themselves on their examination touching their indifferency, it was held that the court ought not to set aside a verdict of guilty, just in itself, though the objections be such, that if known and disclosed before the jurors were elected and sworn, there might have been good cause to challenge the jurors; much less, if the objections be such as would not have been good cause of challenge.—*Presbury v. Com.*, 39 Ky. (9 Dana) 203; *State v. Belcher*, 13 S. C. 459; *Com. v. Jones*, 28 Va. (1 Leigh) 598. See *State v. Greer*, 22 W. Va. 800; *supra*, § 1784, note.

¹ *Supra*, §§ 1271, 1272, 1785; *infra*, § 1827; *State v. Babcock*, 1 Conn. 401; *Dowdy v. Com.*, 50 Va. (9 Gratt.) 727, 60 Am. Dec. 314. See *Stainton v. Beadle*, 4 T. R. 473, 100 Eng. Repr. 1126.

² *R. v. Tremaine*, 5 Barn. & C. 254, 11 Eng. C. L. 452; *Russell v. Barn*, Barnes 455.

³ *McGill v. State*, 34 Ohio St. 328, 32 Am. Rep. 367.

Compare: *R. v. Sullivan*, 8 Ad. & E. 831, 35 Eng. C. L. 865; *People v. Ransom*, 7 Wend. (N. Y.) 417.

⁴ *Ash v. State*, 56 Ga. 583; *State v. Fisher*, 3 N. & McC. L. (S. C.) 261.

⁵ COLO.—*Jones v. People*, 2 Colo. 351. KAN.—*State v. Jackson*, 27 Kan. 581, 41 Am. Rep. 424. MICH.—*Hill v. People*, 16 Mich. 351. NEB.—*Hickey v. State*, 12 Neb. 490, 11 N. W. 744. S. C.—*State v. Quarrel*, 2 Bay L. 150, 1 Am. Dec. 637. WIS.—*Brown v. La Crosse*, 21 Wis. 51. FED.—*Hollingsworth v. Duane*, 4 U. S. (4 Dall.) 353, 1 L. Ed. 865.

Compare: *Chase v. People*, 40 Ill. 352.

See, also, *supra*, § 1634; *infra*, § 1827.

The question depends on the applicatory statute, e. g., whether a colored person can claim colored jurymen, see, *supra*, § 1720.

⁶ In this case, if there be a surprise, there can be a new trial.—

of an infamous offense;⁷ with non-residence;⁸ with irreligion;⁹ with relationship with the prosecutor;¹⁰ with membership of the grand jury which found the bill;¹¹ with partial ignorance of the language.¹² The defendant, in any view, to avail himself of such a defect must have been, without negligence, ignorant of it until after verdict; and if he neglects to use proper diligence in inquiry, or to question the juror at the proper time, disqualification can not be set up as ground for new trial.¹³

§ 1787. JUROR INADMISSIBLE TO IMPEACH VERDICT. Though the former practice was different, it is now settled in England, that a juror is inadmissible to impeach the verdict of his fellows.¹ "It would open each juror," declared Mansfield, C. J., "to great temptation, and would unsettle every verdict in which there could be found upon

Lamphier v. State, 70 Ind. 317; Armendarces v. State, 10 Tex. App. 44.

See other cases, *supra*, § 1605.

⁷ State v. Powers, 10 Ore. 145, 45 Am. Rep. 138.

⁸ See People v. Mortier, 58 Cal. 262; Costly v. State, 19 Ga. 614.

⁹ McClure v. State, 9 Tenn. (1 Yerg.) 206. See R. v. Tremaine, 5 Barn. & C. 254, 11 Eng. C. L. 452.

¹⁰ *Supra*, § 1595. ARK.—Harley v. State, 29 Ark. 17. COLO.—Jones v. People, 2 Colo. 351. GA.—Edwards v. State, 53 Ga. 428; McDonald v. Beall, 55 Ga. 238. ME.—McLellan v. Crofton, 6 Me. (6 Greenl.) 307. N. Y.—Eggleton v. Smiley, 17 Johns. 133. TENN.—Cartwright v. State, 80 Tenn. (12 Lea) 620. TEX.—Jones v. State, 14 Tex. App. 85.

As to what consanguinity is a disqualification, see State v. Congdon, 14 R. I. 458; State v. Williams, 14 W. Va. 851; *supra*, § 1595.

¹¹ *Supra*, § 1596. ALA.—Davis v. State, 54 Ala. 39. IND.—Barlow v. State, 2 Blackf. 114. FLA.—State v. Madoll, 12 Fla. 151. TEX.—McGehee v. Shafer, 9 Tex. 20. WIS.—Bennett v. State, 24 Wis. 24.

¹² Bonneville v. State, 53 Wis. 680, 11 N. W. 427; *supra*, § 1605, and cases, *supra*, § 1779.

¹³ *Supra*, §§ 1278, 1668, 1784; *infra*, §§ 1827-1830. GA.—McAllister v. State, 17 Ga. 434; Osgood v. State, 63 Ga. 791. IND.—Gillooley v. State, 58 Ind. 182; Patterson v. State, 70 Ind. 341. NEB.—Hickey v. State, 12 Neb. 490, 11 N. W. 744. OHIO.—Parks v. State, 4 Ohio St. 234; Becker v. State, 20 Ohio St. 228. S. C.—State v. Quarrel, 2 Bay L. 150, 1 Am. Dec. 637. VA.—Poindexter v. Com., 74 Va. (33 Gratt.) 766. ENG.—R. v. Sutton, 8 Barn. & C. 417, 15 Eng. C. L. 208.

¹ See 1 Whart. Crim. Ev. (Hilton's ed.), § 510.

the jury a man who could be induced to throw discredit on their common deliberations."² Nor are subsequent declarations of jurymen, after a general verdict, admissible to explain or qualify it,³ though the affidavits of bystanders, as to what passed within their knowledge touching the delivery of the verdict, may be received.⁴ In this country the modern English rule has generally been adopted,⁵ though the affidavits of jurors will be entertained for the purpose of explaining, correcting, or enforcing their verdict.⁶ Thus, where a doubt existed, in

² *Aylett v. Jewell*, 2 W. Bl. 1299, 96 Eng. Repr. 761; *Vaise v. Delaval*, 1 T. R. 11, 99 Eng. Repr. 944; *Hindle v. Birch*, 1 Moore 455; *Straker v. Graham*, 4 Mees. & W. 721; *Owen v. Warburton*, 1 N. R. 326.

See *Hilliard on New Trials* (1873) 241.

³ *Clark v. Stevenson*, 2 W. Bl. 803, 96 Eng. Repr. 473.

⁴ *R. v. Wooler*, 6 Maule & S. 366, 105 Eng. Repr. 1280.

⁵ *Supra*, § 1307; 1 Whart Crim. Ev. (Hilton's ed.), § 510. CAL.—*People v. Baker*, 1 Cal. 403; *People v. Doyell*, 48 Cal. 85. CONN.—*State v. Freeman*, 5 Conn. 348. GA.—*State v. Doon*, *Charlton* 1. IND.—*Bennett v. State*, 3 Ind. 167; *Stanley v. Sutherland*, 54 Ind. 339. KAN.—*State v. Horne*, 9 Kan. 119. LA.—*State v. Millican*, 15 La. Ann. 557; *State v. Fruge*, 28 La. Ann. 657; *State v. Nelson*, 32 La. Ann. 842; *State v. Price*, 37 La. Ann. 215. ME.—*State v. Pike*, 65 Me. 111. MASS.—*Com. v. Drew*, 4 Mass. 391. MO.—*State v. Coupenhaver*, 39 Mo. 320; *State v. Branstetter*, 65 Mo. 149; *State v. Alexander*, 66 Mo. 148; *State v. Cooper*, 85 Mo. 256. N. H.—*State v. Ayer*,

23 N. H. 301. N. Y.—*Dan v. Tucker*, 4 Johns. 487; *People v. Columbia*, 1 Wend. 297; *People v. Carnal*, 1 Park. Cr. Rep. 256, 262, 676; *People v. Carnal*, 2 Park. Cr. Rep. 777. N. C.—*State v. Godwin*, 27 N. C. (5 Ired. L.) 401, 44 Am. Dec. 42; *Bellamy v. Pippin*, 74 N. C. 46; *State v. Smallwood*, 78 N. C. 560; *State v. Brittain*, 89 N. C. 481; *State v. Royal*, 90 N. C. 755. PA.—*Cluggage v. Swan*, 4 Binn. 150, 5 Am. Dec. 400. TENN.—*Hudson v. State*, 17 Tenn. (9 Yerg.) 408. TEX.—*Johnson v. State*, 27 Tex. 758. VA.—*Reed v. Com.*, 63 Va. (22 Gratt.) 924.

As to grand jurors, see, *supra*, § 1307.

In Iowa, it is said that an affidavit as to a fellow-juror drinking intoxicating liquors is only to be received when no other evidence is obtainable, and ought to be explicit. — *State v. McLaughlin*, 44 Iowa 82.

⁶ IND.—*Jones v. State*, 89 Ind. 82. MO.—*State v. Rush*, 95 Mo. 199, 8 S. W. 221. N. H.—*State v. Howard*, 17 N. H. 171; *State v. Ayer*, 23 N. H. 301. N. Y.—*Dana v. Tucker*, 4 Johns. 487; *Jackson v. Dickenson*, 15 Johns. 309, 8 Am.

consequence of confusion in the court-room, as to what the exact verdict was, the affidavits of jurors and bystanders were received for the purpose of showing the facts of the case, though all reference was excluded as to the motives or intentions with which such verdict was agreed to, or the circumstances attending the deliberations which led to it.⁷ In Tennessee the English rule appears to be rejected altogether,⁸ though it is proper to observe that in that state, in one instance at least, a disposition has been shown to conform more closely to the general practice, it having been held that affidavits by jurors that they founded their verdict upon particular parts of the testimony given in court, which particular testimony might abstractly be illegal, are not sufficient to authorize a new trial.⁹ Nor is such testimony admissible to show that certain jurors were influenced by the belief that a pardon would be granted after conviction.¹⁰

Yet, at the same time, there is danger of construing the rule in such a way as to work great wrong, by so shielding with secrecy the deliberations of the jury as to permit these deliberations to be irresponsibly conducted in such a way as to outrage public and private rights. The true view is this: Jurors can not be received to qualify by parol testimony matters of record; nor can they be permitted to state matters concerning their deliberations

Dec. 236. ENG.—Cogan v. Ebdon, 1 Burr. 383, 97 Eng. Repr. 361; R. v. Woodfall, 5 Burr. 2667, 98 Eng. Repr. 401.

In California such evidence is now admissible by statute.—Donner v. Palmer, 23 Cal. 40.

⁷ R. v. Woodfall, 5 Burr. 2667, 98 Eng. Repr. 401; R. v. Simons, Sayer. 35, 96 Eng. Repr. 794.

⁸ Crawford v. State, 10 Tenn. (2 Yerg.) 60, 24 Am. Dec. 467; Cochran v. State, 26 Tenn. (7 Humph.) 544; supra, § 1782.

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⁹ Hudson v. State, 17 Tenn. (9 Yerg.) 408.

In Nille v. State, 79 Tenn. (11 Lea) 694, the practice is spoken of as "dangerous," and to be followed with "caution." And see, also, as still more restrictive, Cartwright v. State, 80 Tenn. (12 Lea) 620.

As to grand jurors, see, supra, § 1307; 1 Whart. Crim. Ev. (Hilton's ed.), § 510.

¹⁰ See cases, supra, and at end of § 1782.

which may be proved aliunde, nor the processes of reasoning which led to their conclusion.¹¹ From necessity, however, when gross injustice has been wrought from misconduct or misapprehension in their deliberations, they may be permitted to prove such misconduct or misapprehension. Thus, it has been held that they may prove that the case was decided by lot;¹² or that the instructions of the court were utterly misunderstood;¹³ and a distinction has been taken to the effect that though a juror can not be admitted to stultify his own action, yet he may be permitted to prove gross misconduct in his fellows,¹⁴ should such misconduct be first shown aliunde.¹⁵

Whether jurors may be received as witnesses to purge their conduct from the imputation of impropriety has been doubted.¹⁶ In exceptional cases, however, such testimony has been received;¹⁷ and it has been held that a juror may be examined to disprove the charge of preadjudication.¹⁸

§ 1788. — AND SO ARE AFFIDAVITS ATTACKING JURY. The court, also, will not permit affidavits to be read imputing improper motives to the jury, or tending to im-

¹¹ *State v. Wallman*, 31 La. Ann. 146; *State v. Shock*, 58 Mo. 552.

¹² See *People v. Hughes*, 29 Cal. 257; *Wright v. Illinois Tel. Co.*, 20 Iowa 19; *State v. Horne*, 9 Kan. 718; *supra*, § 1782.

¹³ *Packard v. United States*, 1 Iowa 225; *R. v. Simons*, Sayer 35, 96 Eng. Repr. 794.

¹⁴ *Com. v. Meade*, 78 Mass. (12 Gray) 167, 71 Am. Dec. 741; *Deacon v. Shreve*, 22 N. J. L. (2 Zab.) 176.

See remarks of Taney, C. J., in *United States v. Reid*, 53 U. S. (12 How.) 361, 13 L. Ed. 1023.

As to Texas statute, see *Hodges v. State*, 6 Tex. App. 615.

¹⁵ *Kent v. State*, 42 Ohio St. 426.

¹⁶ CAL. — *People v. Backus*, 5 Cal. 275; *People v. Hughes*, 29 Cal. 257. GA. — *Ray v. State*, 15 Ga. 223; *McGuffie v. State*, 17 Ga. 497. MISS. — *Organ v. State*, 26 Miss. 73. MO. — *Sawyer v. Hannibal etc. R. Co.*, 37 Mo. 240, 90 Am. Dec. 382. VT. — *French v. Smith*, 4 Vt. 363, 24 Am. Dec. 616.

See Hilliard on New Trials (1873) 247.

¹⁷ *Taylor v. Greely*, 3 Me. (3 Greenl.) 204; *Moffett v. Bowman*, 47 Va. (6 Gratt.) 219; *Fries' Case*, 1 Whart. St. Tr. 605, Fed. Cas. No. 5127.

¹⁸ *Supra*, § 1784; *Rader v. State*, 73 Tenn. (5 Lea) 610.

peach their integrity.¹ And where a juror has denied, on oath, before the triers, having formed and expressed an opinion in a criminal case, the affidavit of a single witness to the contrary has been held insufficient to disturb the verdict.²

6. *Misconduct of Prevailing Party.*

§ 1789. SUCH MISCONDUCT GROUND FOR NEW TRIAL. Any misconduct by the prevailing party, intended to affect the jury, and tending so to do will be cause for a new trial,¹ and even an acquittal obtained by fraud or embracery will be no bar to a subsequent indictment.² Nor need such misconduct be traced directly to the party prevailing. Any perversion of justice by means de hors the trial, against which ordinary care could not guard, will justify the court in setting the verdict aside.³ A party, also, who undertakes thus to tamper with a jury is indictable for embracery.⁴

§ 1790. — AND SO OF UNDUE INFLUENCE ON JURY. Evidence that the prosecutor, by exhibiting papers at places where the jury boarded, had been attempting to bias and influence them, will be sufficient to sustain a motion for a new trial;¹ and so where it appeared that the prosecutor spent a night in a room with the jury during their deliberations, the conviction being for manslaughter, and the prosecutor having acted officially as high sheriff both when prosecuting the suit and attending the jury.²

¹ Onions v. Naish, 7 Price 203; Hartwright v. Badham, 11 Price 383; Cooke v. Green, 11 Price 736.

Graham on New Trials 126.

² Epps v. State, 19 Ga. 102.

¹ 2 Hale P. C. 308; Wood v. State, 34 Ark. 341, 36 Am. Rep. 13; Knight v. Inhabitants, etc., 13 Mass. 218; Jeffries v. Randall, 14 Mass. 205; State v. Hascall, 6 N. H. 352.

² See, supra, §§ 1381, 1721 et

seq.; Hylliard v. Nichols, 2 Root (Conn.) 176. See Ohio Code Cr. Proc. § 192.

³ Willis v. People, 32 N. Y. 715.

⁴ Infra, § 1912.

¹ State v. Hascall, 6 N. H. 352. Compare: Coster v. Merest, 3 Brod. & B. 272, 7 Eng. C. L. 726, 7 Moore 87; Spenceley v. De Wilmot, 7 East 108.

² McElrath v. State, 32 Tenn. (2 Swan) 378. See, supra, § 1766.

Wherever, in fine, undue influence is shown, a new trial will be granted.³

§ 1791. — AND SO OF TAMPERING WITH EVIDENCE. Where papers, as has already been seen, not in evidence, are surreptitiously handed to the jury, the verdict will be avoided;¹ and the same result will take place where it appears that a witness on one side has been spirited away by the opposite party,² and where an attempt to bribe a witness is shown.³ Such efforts, however, must be traced to a party or his agents; for the mere absenting of himself by a witness will not be sufficient ground.⁴

§ 1792. — AND SO OF TRICK OF OPPOSITE SIDE, WHEN OPERATIVE. A new trial will be granted when it appears any unfair trick or artifice had been employed, resulting in a verdict in favor of the party using it.¹ Thus, a new trial was granted where the defendant, by the artifice of the prosecuting attorney, went to trial without countervailing testimony, under the belief that certain witnesses of the state were absent, when they are present,

³ Ibid. See *State v. Brittain*, 89 N. C. 481; *State v. Gould*, 90 N. C. 659.

¹ Co. Lit. 227; *Graves v. Short*, Cro. Eliz. 616, 78 Eng. Repr. 357; *Heylor v. Hall*, Palmer 325, 81 Eng. Repr. 1105.

See, also, *supra*, §§ 1771 et seq.

² Bull. N. P. 328.

³ *Bostock v. State*, 10 Tex. App. 705.

⁴ *Grovenor v. Fenwick*, 7 Mod. 156, 87 Eng. Repr. 1162.

¹ CAL.—*People v. Bennett*, 52 Cal. 380. MASS.—*Niles v. Brackett*, 15 Mass. 378. N. Y.—*Jackson v. Warford*, 7 Wend. 62. TEX.—*March v. State*, 44 Tex. 64. ENG.—*Anderson v. George*, 1 Burr. 352, 97 Eng. Repr. 349; *Bodington v.*

Harris, 1 Bing. 187, 8 Eng. C. L. 464.

Graham on New Trials 56.

Improper questions by prosecutor seeking to convey impression accused had been previously convicted of crime, there being no evidence of such conviction, requires a verdict of guilty to be set aside.—*Loe v. State*, 63 Neb. 424.

Technical objections to competent evidence, by prosecuting attorneys, is a "trick" which has received merited rebuke at the hands of the courts, and compels reversal of judgment by the higher court. See *People v. Williams*, 18 Cal. 193; *People v. Divine*, 44 Cal. 452, 460; *People v. Benson*, 52 Cal. 380, 382.

and concealed by the prosecution.² But a new trial will not be granted in a liquor case because the prosecution brought into court a number of female members of a local temperance society who might be supposed to exert an influence on the jury.³

§ 1793. — BUT NOT FOR REMARKS OF OPPOSITE COUNSEL, UNLESS OBJECTED TO AT TIME. A new trial will not be granted simply because counsel, in their addresses, traveled beyond the evidence, or used improper language, unless the court was called upon to interpose, and, on a case requiring it, refused to do so;¹ or where, on objection being made, the trial court promptly and properly instructs the jury not to consider the remarks of counsel objected to, as they are not in the nature of evidence in the case, and were improper to have been made.² But it is otherwise where the court allows the prosecuting counsel to charge the defendant with other offenses beside that on trial, or to take any other unfair advantage of his position.³

² See *Shepherd v. State*, 64 Ind. 43; *Curtis v. State*, 46 Tenn. (6 Cold.) 9.

³ *Nuzum v. State*, 88 Ind. 599.

¹ *Supra*, §§ 1479, 1513, and cases there cited. GA.—*Davis v. State*, 83 Ga. 98. IND.—*Coleman v. State*, 111 Ind. 563, 13 N. E. 100. IOWA.—*State v. Johnson*, 72 Iowa 393, 34 N. W. 177, 9 Crim. Law Mag. 742. MO.—*State v. Barhem*, 82 Mo. 67; *State v. Hicks*, 92 Mo. 431, 4 S. W. 742; *State v. West*, 95 Mo. 139, 8 S. W. 354. NEB.—*Bohanan v. State*, 18 Neb. 57, 53 Am. Rep. 791, 24 N. W. 390. N. C.—*State v. Braswell*, 82 N. C. 693. PA.—*Com. v. Hanlon*, 3 Brewst. 461.

As to right and duty of court to stop improper comment of counsel in argument, see 1 Am. St. Rep. 368.

² *Kennison v. State*, 88 Neb. 391, 119 N. W. 768.

³ *Supra*, §§ 1496, 1505, 1506, 1513. FLA.—*Newton v. State*, 21 Fla. 53. IND.—*State v. Click*, 40 Ind. 265; *Long v. State*, 56 Ind. 182, 26 Am. Rep. 19; *Shepherd v. State*, 64 Ind. 43. MISS.—*Thomas v. State*, 61 Miss. 60; *Martin v. State*, 63 Miss. 505, 56 Am. Rep. 812. MO.—*State v. Mahly*, 68 Mo. 315; *State v. Jackson*, 95 Mo. 623, 8 S. W. 749. N. C.—*State v. Smith*, 75 N. C. 306; *State v. Rogers*, 94 N. C. 860. WIS.—*Sasse v. State*, 68 Wis. 530, 32 N. W. 849.

As to granting new trial or reversal for unfair or irrelevant argument of counsel, see notes, 46 L. R. A. 643, 645, 646; 32 Am. St. Rep. 155; 37 Am. St. Rep. 823;

§ 1796. — **MUST BE SUPPORTED BY AFFIDAVITS.** But the rule will not ordinarily be granted, if supported only by the affidavit of the party. The motion, if practicable, must be accompanied by the affidavit of the newly discovered witnesses,¹ taken on notice.² And these affidavits must express the party's belief as well as his information.³

§ 1797. — **MAY BE CONTESTED.** The adverse party may show, by affidavits, that the witnesses whose testimony is stated to be material are wholly unworthy of credit.¹

§ 1798. — **MUST BE USUALLY MOVED BEFORE JUDGMENT.** A motion for a new trial will not ordinarily be heard after a judgment has been regularly perfected, although it be on the ground of evidence newly discovered since the judgment.¹

§ 1799. **EVIDENCE MUST BE NEWLY DISCOVERED.** The evidence must have been discovered since the former trial.¹ In a Georgia case, for instance, where it appeared that the prisoner's attorney had made diligent inquiries as to the prisoner's participation in the corpus delicti, but had been misled, it was held that a new trial would be granted on evidence, newly discovered, being offered to the effect that the prisoner did not make the assault charged.² But unless newly discovered, the existence of such testimony is not adequate ground.³ There may, how-

¹ See cases to last section, and:
ARK.—Runnels v. State, 28 Ark. 121; Robinson v. State, 33 Ark. 180. GA.—Farrow v. State, 48 Ga. 30. KAN.—State v. Kellerman, 14 Kan. 135. LA.—State v. Edwards, 34 La. Ann. 142; State v. Sweeney, 37 La. Ann. 1. TEX.—Evans v. State, 6 Tex. App. 513; Tuttle v. State, 6 Tex. App. 556.

² Shields v. State, 45 Conn. 266.

³ Taylor v. State, 79 Tenn. (11 Lea) 708.

¹ Parker v. Hardy, 41 Mass. (24 Pick.) 246; Williams v. Baldwin, 18 Johns. (N. Y.) 489.

¹ Infra, § 1831.

¹ Hudgins v. State, 61 Ga. 182; Lee v. State, 69 Ga. 705; State v. Curtis, 77 Mo. 267; Williams v. State, 7 Tex. App. 163; Heskew v. State, 14 Tex. App. 606;.

² Thomas v. State, 52 Ga. 509.

³ GA.—Roach v. State, 34 Ga. 78; Carter v. State, 46 Ga. 637. LA.—State v. Lamothe, 37 La. Ann. 43;

ever, be cases, if duly sustained by affidavit, when supposed knowledge of the testimony at the time of the trial may be explained and avoided by proof that the defendant was at the time mentally incapable of taking cognizance of facts.⁴

§ 1800. ACQUITTAL OF CO-DEFENDANT AS A WITNESS NO GROUND. A new trial will not at common law be granted on the ground that a co-defendant, tried at the same time and acquitted, was a material witness for the convicted defendant, such testimony not being newly discovered, and there having been at the trial no application for a severance; though the acquitted defendant was then, for the first time, a competent witness.¹ Where, however, after an application for severance, in order to admit the wife of one party as a witness for the other, the former party was acquitted, but the latter convicted, and the wife of the former swore in an affidavit to a complete alibi as to the latter, it was held that as she herself was not on the record, but was excluded merely by policy of law on the joint trial, and as she had been made competent by the verdict of a jury, a new trial would be granted.² But where co-defendants can be witnesses for each other on trial this ground can not be laid.

State v. Price, 37 La. Ann. 215. PA.—Com. v. Murray, 2 Ashm. 41; Com. v. Williams, 2 Ashm. 69. VA.—Read v. Com., 63 Va. (22 Gratt.) 924. ENG.—Vernon v. Hankey, 2 T. R. 113, 100 Eng. Repr. 62.

⁴ Thompson v. State, 54 Ga. 577.

¹ MASS.—Sawyer v. Merrill, 27 Mass. (10 Pick.) 16. N. H.—State v. Bean, 36 N. H. 122. N. Y.—People v. Vermilyea, 7 Cow. 369. ORE.—State v. Drake, 11 Ore. 396, 4 Pac. 1204. TEX.—Lyles v. State, 41 Tex. 172, 19 Am. Rep. 38.

Compare: Rich v. State, 1 Tex.

App. 206; Huebner v. State, 3 Tex. App. 458; Williams v. State, 4 Tex. App. 5; Rucker v. State, 7 Tex. App. 549; Gibbs v. State, 30 Tex. App. 581, 18 S. W. 88; Sanders v. State, 52 Tex. Cr. Rep. 465, 124 Am. St. Rep. 1101, 107 S. W. 839, and *infra*, § 1814.

On trial and conviction of defendant the subsequent trial and acquittal of a co-defendant is newly-discovered evidence.—Gill v. State, 56 Tex. Cr. Rep. 202, 17 Ann. Cas. 1164, 119 S. W. 684.

² Com. v. Manson, 2 Ashm. (Pa.) 31; Com. v. Toland, 11 Phila. (Pa.)

§ 1801. — **NOR IS ACQUITTAL OF DEFENDANT OF A PART OF COUNT ON WHICH HE WAS EXCLUDED AS A WITNESS.** A cognate question arises under the peculiar provisions of the Pennsylvania statute which permits persons charged with crimes not exclusively cognizable in the Oyer and Terminer to testify in their own behalf. It has been held that when the defendant is charged with a divisible offense, part of which is so cognizable in the Oyer and Terminer, where the trial is, and after exclusion as a witness, is acquitted of the offense so cognizable in Oyer and Terminer, this does not by itself entitle him to a new trial for the minor offense of which he was convicted.¹

§ 1802. **EVIDENCE DISCOVERED BEFORE VERDICT SHOULD BE GIVEN AT ONCE TO JURY.** If new evidence be discovered before the verdict is rendered, it should be submitted to the jury; and if this duty is neglected, unless there is clear proof of mistake, a new trial will not be granted.¹ The judge at the trial has discretion as to the admission of evidence out of the regular and usual course, and must exercise such discretion when necessary to promote justice.²

§ 1803. **IF EVIDENCE COULD HAVE BEEN SECURED AT FORMER TRIAL, GROUND FAILS.** The evidence must be such as could not have been secured at the former trial by a rea-

433; *Anderson v. State*, 8 Tex. App. 542.

Where an accessory was acquitted after conviction of his principal, and the accessory's evidence was material, a new trial was held properly granted to let it in.—*Helm v. State*, 20 Tex. App. 41. See, also, reading note in footnote 1, this section.

¹ *Hunter v. Com.*, 79 Pa. St. 505; *Com. v. Solby*, 15 W. N. C. (Pa.) 392.

¹ *Supra*, §§ 1499 et seq.; *Higden v. Higden*, 9 Ky. (2 A. K. Marsh.) 42; *Cavanah v. State*, 56 Miss. 300; *State v. Porter*, 26 Mo. 201; *People v. Vermilyea*, 7 Cow. (N. Y.) 369; *Com. v. Hanlon*, 3 Brews. (Pa.) 461; *United States v. Gilbert*, 2 Sumn. 19, Fed. Cas. No. 15204.

See *Keenan v. People*, 104 Ill. 385, a case of much interest.

² See, *supra*, § 1502.

sonable diligence on part of the defendant, which fact should appear on the affidavit.¹

Thus, where it appeared that the witness, on whose testimony was sought a new trial, after a conviction of murder, was with the prisoner until a late hour of the evening on which the murder was committed, was in court while the trial was progressing, and had gone to a relative of the prisoner and told him what she was able to testify to; the motion was refused.²

§ 1804. — AND SO OF WITHHOLDING OF PAPERS WHICH DUE DILIGENCE COULD HAVE SECURED. Nor will a new trial be granted because the district attorney withheld in his hands papers important to the defendant, unless the latter used due diligence to obtain them. Thus, where the district attorney told the defendant that certain papers were in the hands of C, who, being applied to, answered they were in the possession of the district attorney, but the defendant did not explain the mistake and apply to the district attorney again, a new trial was refused.³

§ 1805. — OTHERWISE IN CASES OF SURPRISE. A new trial will sometimes be granted on the affidavit of a wit-

¹ ARK.—Holeman v. State, 13 Ark. (3 Eng.) 105. CONN.—Lester v. State, 11 Conn. 415. GA.—Roberts v. State, 3 Ga. 310; Wright v. State, 34 Ga. 110; McAfee v. State, 31 Ga. 411; Carter v. State, 46 Ga. 637; Williams v. State, 67 Ga. 260; Hanvey v. State, 68 Ga. 612. IND.—O'Dea v. State, 57 Ind. 31. MASS.—Com. v. Drew, 4 Mass. 399. MISS.—Friar v. State, 4 Miss. (3 How.) 422. N. Y.—People v. Vermilyea, 7 Cow. 369. PA.—Com. v. Williams, 2 Ashm. 69. S. C.—State v. Harding, 2 Bay L. 267. TENN.—Gilbert v. State, 26 Tenn.

(7 Humph.) 524. TEX.—Shaw v. State, 27 Tex. 750; Williams v. State, 4 Tex. App. 55; Hasselmeyer v. State, 6 Tex. App. 21; Collins v. State, 6 Tex. App. 72; Hutchinson v. State, 6 Tex. App. 468; White v. State, 10 Tex. App. 167. VA.—Bennett v. Com., 35 Va. (8 Leigh) 745; Read v. Com., 63 Va. (22 Gratt.) 723.

As to affidavit, see State v. Williams, 14 W. Va. 851.

² Com. v. Williams, 2 Ashm. (Pa.) 69.

³ People v. Vermilyea, 7 Cow. (N. Y.) 369. See, *infra*, § 1822.

ness, that he was mistaken or surprised at his examination.¹

§ 1806. PARTY DISABLED WHO NEGLECTS TO OBTAIN EVIDENCE ON TRIAL. A party who seeks for a new trial on the ground of newly-discovered evidence is chargeable with laches, if, previous to the trial, he knew that the witness, whose testimony he seeks to introduce as newly discovered, must, probably, from his occupation and employment at the time of the transaction, the subject of the controversy, be conversant with the facts in relation to the transaction,¹ and especially where, previous to the trial, the party knew, as the witness himself testifies to, what the witness could prove, although at the time of the trial, and while preparing therefor, the party had forgotten the facts.² It is not such newly-discovered evidence as will entitle him to a new trial, that the party applying for a new trial could not procure in time the witness whom he seeks to introduce. He should have applied to the court for a postponement; and if without doing this he went to trial without the testimony, a new trial will not be granted for the purpose of letting in such evidence.³ Nor is the absence of a witness who had not been subpoenaed a good cause for granting a new trial;⁴ though it is otherwise with the sudden illness of a witness in cases where the deposition of the witness can not be taken, and the witness is material.⁵ Nor will a new trial be granted on account of the want of recollection of a fact, which by due attention might have been

¹ *Infra*, § 1820.

² *State v. Bell*, 49 Iowa 440; *State v. Adams*, 31 La. Ann. 717; *Collins v. State*, 6 Tex. App. 72.

³ *Richie v. State*, 58 Ind. 355; *People v. Superior Court of New York*, 10 Wend. (N. Y.) 285.

⁴ *Jackson v. Malin*, 15 Johns. (N. Y.) 293; *State v. Frittener*, 65

Mo. 422; *State v. Smith*, 65 Mo. 314; *Gordon v. Harvey*, 8 Va. (4 Call) 450.

Same principle in *Tobin v. People*, 101 Ill. 121.

⁵ *Lester v. Goode*, 6 N. C. (2 Murph. L.) 37; *Kelly v. Holdship*, 1 Browne (Pa.) 36.

⁶ *Infra*, § 1822.

remembered; "want of recollection being easy to be pretended and hard to be disproved."⁶

§ 1807. EVIDENCE MUST BE MATERIAL AND NOT CUMULATIVE. The evidence offered must be material in its object, and not merely cumulative and corroborative.¹ Cumulative evidence, in this sense, is such as goes to support the facts principally controverted on the former trial, and respecting which the party asking for a new trial, as well as the adverse party, produced testimony.² Where the defense was epileptic insanity, the alleged fact that the defendant, subsequent to the trial and conviction, had an epileptic fit, is cumulative in this sense, and hence no ground.³ But it is otherwise if such new evidence con-

⁶ *Duignan v. Wyatt*, 3 Blackf. (Ind.) 385; *Bond v. Cutler*, 7 Mass. 205.

¹ ARK.—*Bixby v. State*, 15 Ark. 395; *White v. State*, 17 Ark. 404. CAL.—*People v. McDonnell*, 47 Cal. 134; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323. COLO.—*Piela v. People*, 6 Colo. 343. CONN.—*State v. Lee*, 69 Conn. 186, 37 Atl. 75. GA.—*McAfee v. State*, 31 Ga. 411; *Hoye v. State*, 39 Ga. 718; *Holmes v. State*, 54 Ga. 303; *O'Shields v. State*, 55 Ga. 696; *Dougherty v. State*, 7 Ga. App. 91, 66 S. E. 276. ILL.—*Adams v. People*, 47 Ill. 376; *Sahlinger v. People*, 102 Ill. 241; *Collins v. People*, 103 Ill. 21. IOWA.—*State v. Johnson*, 72 Iowa 393, 34 N. W. 177. LA.—*State v. Claude*, 35 La. Ann. 7; *State v. Fahey*, 35 La. Ann. 9. MISS.—*State v. Blennerhassett*, 1 Miss. (1 Walker) 7. MO.—*State v. Larrimore*, 20 Mo. 425; *State v. Stumbo*, 26 Mo. 306; *State v. Evans*, 65 Mo. 574; *State v. Butler*, 67 Mo. 59; *State v. Rockett*, 87 Mo. 666; *State v. Woodward*, 95

Mo. 129, 8 S. W. 220. NEB.—*St. Louis v. State*, 8 Neb. 406. N. H.—*State v. Carr*, 21 N. H. (1 Fost.) 166, 53 Am. Dec. 179. N. M.—*Territory v. Yarberrry*, 2 N. M. 391. N. Y.—*Williams v. People*, 45 Barb. 201, N. C.—*State v. Starnes*, 97 N. C. 423, 2 S. E. 447. N. D.—*Pengilly v. Case Threshing Mach. Co. (J. L.)*, 11 N. D. 249, 91 N. W. 63. ORE.—*Territory v. Latshaw*, 1 Ore. 146. PA.—*Com. v. Flanagan*, 7 Watts & S. 415; *Com. v. Williams*, 2 Ashm. 69; *Com. v. Kane*, 12 Phila. 630. TEX.—*Murray v. State*, 36 Tex. 642; *Lewis v. State*, 15 Tex. App. 648; *McAdams v. State*, 24 Tex. App. 86, 5 S. W. 826. WIS.—*Anderson v. Arpin Hardwood Lumber Co.*, 131 Wis. 34, 110 N. W. 788. FED.—*United States v. Gibert*, 2 Sumn. 19, Fed. Cas. No. 15204.

See, *supra*, § 1794.

² *State v. Kinney*, 108 Ill. 519; *Klein v. People*, 113 Ill. 596; *State v. Redemeier*, 71 Mo. 173, 36 Am. Rep. 462.

³ *People v. Montgomery*, 13 Abb. Pr. N. S. (N. Y.) 207.

sists of a strong mass of proof previously unknown to the party.⁴

§ 1808. SURPRISE IS AN EXCEPTION. But though a new trial is not usually granted for the discovery of new evidence to a point which was presented on the former trial, yet a case of surprise will form an exception to the rule.¹

§ 1809. — AND SO WHERE EVIDENCE OF A DISTINCT CLASS. Nor can it be objected to granting a motion for a new trial, on the ground of newly-discovered evidence, that such evidence is cumulative, if it is of a different kind or character from that adduced on the trial.¹ This is peculiarly the case when strong independent proof of insanity is offered.²

§ 1810. NEW TRIAL NOT GRANTED MERELY TO DISCREDIT OPPOSING WITNESS. Where the object is to discredit a witness on the opposite side, the general rule is that a new trial will not be granted.¹ Thus, where the defendant was convicted of forgery, chiefly on the evidence of B R,

⁴ Andersen v. State, 43 Conn. 514, 21 Am. Rep. 669.

¹ Infra, § 1822.

¹ Long v. State, 54 Ga. 564; Guyott v. Butts, 4 Wend. (N. Y.) 579.

² Andersen v. State, 43 Conn. 514, 21 Am. Rep. 669.

¹ ARK.—Wallace v. State, 28 Ark. 531; Campbell v. State, 38 Ark. 498; Redman v. State, 40 Ark. 445. GA.—Levinig v. State, 13 Ga. 513; Brown v. State, 55 Ga. 169; Beck v. State, 65 Ga. 766; Partee v. State, 67 Ga. 570. ILL.—Tobin v. People, 101 Ill. 121; Friedburg v. People, 102 Ill. 190. IND.—Bland v. State, 2 Ind. 608; Morel v. State, 89 Ind. 275. LA.—State v. Young, 34 La. Ann. 346;

State v. Diskin, 35 La. Ann. 46. MASS.—Com. v. Drew, 4 Mass. 399; Com. v. Waite, 5 Mass. 261; Com. v. Green, 17 Mass. 515. MO.—State v. Bates, 67 Mo. 59; State v. Wilson, 117 Mo. 570, 21 S. W. 443. NEB.—Ogden v. State, 13 Neb. 436, 14 N. W. 165. N. H.—State v. Carr, 21 N. H. (1 Fost.) 166, 53 Am. Dec. 179; State v. Danforth, 73 N. H. 215, 111 Am. St. Rep. 600, 6 Ann. Cas. 577, 60 Atl. 839. ORE.—Territory v. Latshaw, 1 Ore. 146; State v. Gardner, 33 Ore. 153, 54 Pac. 811; State v. Hill, 39 Ore. 95, 65 Pac. 520. PA.—Com. v. Williams, 2 Ashm. 69. TENN.—Parham v. State, 78 Tenn. (10 Lea) 498. TEX.—Herber v.

and on a motion for a new trial evidence was produced to show the bias of B B, it was held by the Supreme Court of Massachusetts that such evidence was no ground for the motion.² And a new trial was refused where, after a verdict of guilty upon an indictment for perjury, the defendant applied for a new trial on account of newly-discovered evidence, and furnished proof that a material witness for the prosecution had, subsequently to his examination upon the stand, expressed strong feelings of hostility toward the prisoner;³ and the same position has been taken in a case in which it was alleged that a prosecutrix in rape had made a statement inconsistent with her evidence on the trial.⁴ But it is otherwise where a principal witness declares that his statement on trial was a mistake.⁵

§ 1811. SUBSEQUENT INDICTMENT FOR PERJURY NO GROUND. An indictment for perjury against a witness on whose testimony the verdict was obtained, unless the case was so gross as to make it probable that the verdict was obtained by perjury, or that the false testimony occasioned a surprise to the opposite party, will not be in itself sufficient cause for new trial.¹ Where there has been a

State, 7 Tex. 69; Brown v. State, 6 Tex. App. 286; Hutchinson v. State, 6 Tex. App. 468; Polser v. State, 6 Tex. App. 510; Atkins v. State, 11 Tex. App. 89; Grate v. State, 23 Tex. App. 458, 5 S. W. 245. VA.—Thompson v. Com., 49 Va. (8 Gratt.) 637. W. VA.—State v. Williams, 14 W. Va. 851.

² Com. v. Waite, 5 Mass. 261. See Hammond v. Wadhams, 5 Mass. 353.

³ Com. v. Drew, 4 Mass. 391; State v. Carr, 21 N. H. (1 Fost.) 166, 53 Am. Dec. 179.

⁴ Shields v. State, 45 Conn. 266; Arwood v. State, 59 Ga. 391; Doyal

v. State, 70 Ga. 134; Leighton v. People, 10 Abb. N. C. (N. Y.) 261; affirmed 88 N. Y. 117.

⁵ Fisher v. People, 103 Ill. 101; Fletcher v. People, 117 Ill. 184, 7 N. E. 80; Mann v. State, 44 Tex. 642.

¹ Respublica v. Newell, 2 Yeates (Pa.) 479; R. v. Heydon, 1 W. B. L. 351, 96 Eng. Repr. 195; Benfield v. Pertrie, 3 Doug. 24, 26 Eng. C. L. 27; Warwick v. Bruce, 4 M. & S. 140, 9 Price 89.

Perjury should not be prosecuted during pendency of civil proceedings.—See 2 Kerr's Whart. Crim. Law, § 1588.

surprise, however, arising from the unexpected introduction of the alleged perjured witness, a new trial has been granted.³

§ 1812. EVIDENCE SHOULD BE SUCH AS TO CHANGE RESULT ON MERITS. "After the verdict," said Rogers, J., on a motion for a new trial, after a capital conviction, in Pennsylvania, "when the motion for a new trial is considered, the court must judge not only of the competency but of the effect of evidence. If, with the newly-discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted; otherwise we are bound to refuse the application."¹ And when the evidence produced is clearly immaterial, this limitation should be strictly enforced.² But a reasonable doubt as to the effect of the testimony should inure in favor of the defendant.³

§ 1813. NEW DEFENSE MUST NOT BE MERELY TECHNICAL. Another essential is that the after-discovered evidence should go to the merits, and not rest on a merely technical

² Morrell v. Kimball, 1 Me. (1 Greenl.) 322; Thurtell v. Beaumont, 1 Bing. 339, 8 Eng. C. L. 538.

¹ COLO.—Perry v. People, 33 Colo. 94, 69 Pac. 519. CONN.—Hamlin v. State, 48 Conn. 92. GA.—Carr v. State, 14 Ga. 358; Roach v. State, 34 Ga. 78; Jones v. State, 48 Ga. 163; Young v. State, 56 Ga. 403; Meeks v. State, 57 Ga. 329. IND.—Rainey v. State, 53 Ind. 278. ME.—Linscott v. Orient Ins. Co., 88 Me. 497, 51 Am. St. Rep. 435, 34 Atl. 405. N. H.—Crofts v. Union Mut. F. Ins. Co., 36 N. H. 44. N. C.—State v. Greenwood, 2 N. C. (1 Hayw. L.) 141. PA.—Com. v. Flanagan, 7 Watts & S. 423; Com. v. Mason, 2 Ashm. 31. TEX.—Hauck

v. State, 1 Tex. App. 357. VA.—Thompson v. Com., 49 Va. (3 Gratt.) 637.

² State v. O'Grady, 31 La. Ann. 378; Jackson v. State, 18 Tex. App. 586; Whitehurst's Case, 79 Va. 556.

Confession of wife that she herself had committed the offense without her husband's privity, after the conviction of the husband of forgery, was held not sufficient, when taken in connection with the evidence given on trial, to justify a new trial being granted.—State v. J. W., 1 Tyl. (Vt.) 417.

After-discovered witness was incompetent, does not justify order granting new trial.—Williams v. State, 62 Ga. 260.

³ Lindley v. State, 11 Tex. App. 283.

defense. Thus, after a conviction on an indictment for selling spirituous liquors, etc., "without being duly licensed as an innholder or common victualer," a new trial will not be granted for the purpose of allowing the defendant to give in evidence a license, which he had omitted to produce, to sell fermented liquor, and thus raise a question as to the mere form of the indictment.¹ And in larceny a new trial will not be granted on ground of evidence that the goods did not technically belong to the owner charged in the indictment.²

§ 1814. ACQUITTAL OF CO-DEFENDANT NO GROUND. We have already seen that under the old practice, excluding defendants as witnesses, new trials were not granted because a co-defendant, tried at the same time and acquitted, was a material witness for the convicted defendant.¹ Of course, under statutes rehabilitating parties as witnesses, where such co-defendants could have been called on trial, their acquittal is in no sense a reason for a new trial.

§ 1815. REFUSAL TO SEVER DEFENDANTS MAY BE GROUND. Though the misjoinder of the defendants, where it appears on record, is subject of demurrer or arrest,¹ and though when it is developed on evidence, it is properly to be reached by a motion for severance, it not unfre-

¹ Com. v. Churchill, 43 Mass. (2 Metc.) 118.

² Foster v. State, 52 Miss. 595.

¹ MISS.—Cavanah v. State, 56 Miss. 300. N. H.—State v. Bean, 36 N. H. 122. N. Y.—People v. Vermilyea, 7 Cow. 367. PA.—Com. v. Manson, 2 Ashm. 32; Com. v. Chauncey, 2 Ashm. 90. FED.—United States v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15204. Crim. Proc.—142

See, also, Brackenridge's Law Miscellanies 220.

Compare: Supra, §§ 355, 356, 1800.

In Texas a contrary doctrine prevails.—Lyles v. State, 41 Tex. 172, 19 Am. Rep. 38; Rich v. State, 1 Tex. App. 206; Brown v. State, 6 Tex. App. 286; Voight v. State, 13 Tex. App. 21; Jackson v. State, 13 Tex. App. 586.

¹ See, supra, § 358.

quently becomes the ground of a motion for a new trial, and when wrongfully allowed by the court is a legitimate reason for setting aside the verdict.²

² *People v. Vermilyea*, 7 Cow. (N. Y.) 383; *supra*, § 1800.

As has been already stated in an indictment against several, where the offense is such that it may have been committed by several, they are not of right entitled to be tried separately, but are to be tried in that manner only when the court, on sufficient cause, may think proper.—*Supra*, § 345, 1639. See, also: *ME.*—*State v. Soper*, 16 Me. 293, 33 Am. Dec. 665. N. Y.—*People v. Howell*, 4 Johns. 296; *People v. Vermilyea*, 7 Cow. 108, 383. N. C.—*State v. Smith*, 24 N. C. (2 Ired. L.) 402. PA.—*Com. v. Manson*, 2 Ashm. 32. S. C.—*State v. Wise*, 7 Rich. L. 412. FED.—*United States v. Wilson*, 1 Bald. 78, Fed. Cas. No. 16730; *United States v. Gibert*, 2 Sumn. 19, Fed. Cas. No. 15204.

Contra: Campbell v. Com., 4 Va. (2 Va. Cas.) 314; *United States v. Sharp*, Pet. 118, Fed. Cas. No. 16264.

At the same time, where several defendants, entirely disconnected in the transactions through which they are sought to be convicted, are jointly indicted, it would be sound exercise of discretion to grant them separate trials.—*People v. Vermilyea*, 7 Cow. (N. Y.) 108. See, *supra*, § 345.

How far one may be a witness for the other, is elsewhere discussed.—1 *Whart. Crim. Ev.* (Hilton's ed.), § 445.

When one co-defendant, by the local law, is inadmissible as a witness for the others, if no evidence be given against him, he is entitled to his discharge as soon as the case of the prosecutor is closed, and may then be examined on behalf of the other defendants. Where there is any evidence against him, he can not be sworn, but the whole must be submitted together to the jury.—*Bul. N. P.* 285; *Peake's Evid.* 168; *Phil. Evid.* 36; 1 *East* 312, 313; 6 *T. R.* 627; 1 *Sld.* 237; 1 *Hale* 303; *Com. v. Manson*, 2 Ashm. (Pa.) 32.

On the same principle, where one of the defendants, on an indictment for an assault, submits to a small fine and is discharged, he may be called on the part of others, with whom he was jointly indicted. And where one defendant has actually pleaded misnomer, he may be received as a witness, because the indictment, as against him, is abated.—*Ibid.*

But if he suffers judgment by default, he can not afterwards become a witness against or in favor of his associates (5 *Esp. Rep.* 154; 2 *Campb.* 333, 334, n.; *Bul. N. P.* 285; *Phil. Ev.* 36); since no sentence can be constitutionally imposed on a verdict so obtained.—*Supra*, § 1486; also *Rose v. State*, 20 *Ohio* 31; *Andrews v. State*, 34 *Tenn.* (2 *Sneed*) 550; *Jackson v. Com.*, 60 *Va.* (19 *Gratt.*) 656. See *R. v. Roberts*, 2 *Str.* 1208, 93 *Eng. Repr.* 1131.

8. *Absence of Defendant at Trial.*

§ 1816. SUCH ABSENCE MAY BE GROUND FOR NEW TRIAL. Where, through necessity or mistake, a defendant, in ordinary prosecutions for crime, is absent during the trial, there should be a new trial.¹ Nor is the fact that the counsel of the accused is present during the trial, and at the rendering of the verdict, without making objection to the prisoner's absence, a waiver of his right to be present. Some misdemeanors there indeed are, partaking of the nature of civil process, where, as has been seen, appearance by attorney is permissible,² but in all trials in which corporal punishment may be assigned the defendant must personally be present;³ and this right is so inherent and inalienable, that a judgment will be reversed where it appears that the defendant was absent at the rendition of the verdict, though his presence was at the time waived by his counsel.⁴ In crimes of high grade, the record must show the prisoner's presence at trial, verdict, and sentence, affirmatively, or else the error will be fatal.⁵ But the presence may be inferred from the record, and need not be explicitly stated at each stage of the procedure.⁶

Yet to this rule two exceptions must be expressed. The first is, that it is not to be stretched so as to include occasional voluntary absence for a few moments from the court-room by the defendant, though it should happen that during such brief absence the verdict should happen to be brought in;⁷ though in all cases of high crime it

¹ Supra, §§ 1371-1375.

² Supra, § 1371.

³ Supra, §§ 1371 et seq.; 1 Chitty Cr. L. 413; 2 Hale 216; Gladden v. State, 12 Fla. 562; Jacobs v. Com., 5 Serg. & R. (Pa.) 315; Leschi v. Territory, 1 Wash. Terr. 23; Sha-poonmash v. Territory, 1 Wash. Terr. 219.

⁴ Supra, §§ 1371 et seq., 1668. See *Prine v. Com.*, 18 Pa. St. 103.

⁵ Supra, §§ 1371 et seq.; *State v. Smith*, 31 La. Ann. 406; *Dunn v. Com.*, 6 Pa. St. 387; *Hamilton v. Com.*, 16 Pa. St. 121.

⁶ *Lawrence v. Com.*, 71 Va. (30 Gratt.) 845.

⁷ *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736.

would be necessary in such case for the jury to be kept back from formally rendering their verdict until the defendant returns.⁸ The second is, that when the defendant behaves so obstreperously that his temporary compulsory removal from the court-room is necessary, he can not complain of the trial proceeding for a short time in his absence, he losing the privilege of objecting by his conduct.⁹

Waiver, so far as concerns this particular right, has been already discussed.¹⁰

9. *Mistake in Conduct of Cause.*

§ 1817. MISTAKE MAY BE GROUND, IF THERE WAS DUE DILIGENCE. Where the cause has been prejudiced from some misconception of the judge, or mistake of the party or his counsel, which could not have been cured by ordinary prudence and care, a new trial will be allowed.¹ Thus, where the counsel were misled by a positive intimation from the court, and refrained from offering evidence,² and where the judge misapprehended a material fact, and misdirected the jury,³ a new trial has been granted. But, if due diligence could have corrected the mistake, the rule will be refused. Thus, a new trial will not be granted because a juror was taken from the panel, on the erroneous supposition that there was good ground to challenge him, when the defendant did not at the time object.⁴

§ 1818. MISTAKE OF LAW NO GROUND. Ignorance of, or mistake as to, the law furnishes no defense to a criminal prosecution, and of course can not be made the ground

⁸ *Supra*, § 1486.

⁹ See cases cited *supra*, §§ 1479 et seq.; *Fight v. State*, 7 Ohio 180; *United States v. Davis*, 6 Blatchf. 464, Fed. Cas. No. 14923.

¹⁰ *Supra*, §§ 1371, 1668.

¹ *Heskey v. State*, 14 Tex. App.

606; *Ohms v. State*, 49 Wis. 415, 5 N. W. 827.

² *Dunham v. Baxter*, 4 Mass. 79; *Le Flemming v. Simpson*, 1 Mann. & R. 269, 17 Eng. C. L. 664.

³ *Supra*, §§ 1731, 1736.

⁴ *Com. v. Stowell*, 50 Mass. (9 Met.) 572.

for granting a new trial on verdict of guilty;¹ and the same is true as to the advice of counsel.² Mistake by counsel of law will be no excuse, whether made generally in the conduct of a cause, or in the neglect to object to testimony when offered which might have been excluded.³ But, if objection is made to the introduction of testimony at the proper time, no objection to the judge's charge upon that evidence is afterward necessary.⁴ If an objection to evidence, which objection could have been obviated by further proof, be not made, it will not be received as the ground of a motion for a new trial.⁵ Where, however, evidence is not sufficient in law to authorize a verdict, a new trial will be granted, even though no objection be made at the trial.⁶ But as a rule there is no new trial because counsel ignorantly neglect to present proper points of law to the court.⁷

¹ See generally, among many other cases: CAL.—*People v. Kilvington*, 4 Cal. Unrep. 512, 36 Pac. 13. GA.—*Levar v. State*, 103 Ga. 42, 29 S. E. 467; *Fraser v. State*, 112 Ga. 13, 37 S. E. 114. IND.—*Winehart v. State*, 6 Ind. 30; *State v. Malney*, 65 Ind. 404. KY.—*Jellico Coal-Min. Co. v. Com.*, 96 Ky. 373, 29 S. W. 26. MASS.—*Com. v. Boynton*, 84 Mass. (2 Allen) 160; *Com. v. Farren*, 91 Mass. (9 Allen) 439; *Com. v. Walte*, 93 Mass. (11 Allen) 264, 87 Am. Dec. 711; *Com. v. Reymond*, 97 Mass. 567; *Com. v. Everson*, 140 Mass. 292, 2 N. E. 839; *Com. v. O'Brien*, 172 Mass. 248, 52 N. E. 77. MINN.—*Mankato (Village of) v. Meagher*, 17 Minn. 265. MO.—*State v. Welch*, 70 Mo. 284, 39 Am. Rep. 515; *State v. Wilforth*, 74 Mo. 528, 41 Am. Rep. 330. N. H.—*State v. Marsh*, 36 N. H. 196; *State v. Carver*, 69 N. H. 216, 39 Atl. 973. N. J.—

Cutler v. State, 36 N. J. L. (7 Vr.) 125; *State v. Halsted*, 39 N. J. L. (10 Vr.) 402. N. Y.—*Gardner v. People*, 62 N. Y. 299, 2 Cow. Cr. Rep. 175, affirming 3 Hun 222, 5 Thomp. & C. 678; *Hamilton v. People*, 57 Barb. 625. N. C.—*State v. McLean*, 121 N. C. 589, 42 L. R. A. 721, 28 S. E. 140. R. I.—*State v. Foster*, 22 R. I. 163, 60 L. R. A. 339, 46 Atl. 833.

As to rule under Texas Pen. Code, art. 46 (1895), see *Patrick v. State*, 45 Tex. Cr. Rep. 587, 78 S. W. 947.

² *State v. Hunt*, 25 R. I. 75, 54 Atl. 937.

³ See cases cited supra, §§ 1740 et seq.; and infra, § 1819.

⁴ Supra, §§ 1740 et seq.; *People v. Holmes*, 5 Wend. (N. Y.) 192.

⁵ Supra, § 1743.

⁶ Supra, § 1752.

⁷ Supra, §§ 1643 et seq.

§ 1819. — **NOR IS NEGLIGENCE OF COUNSEL.** Mere ordinary negligence of counsel is no ground.¹ Thus, as has been already seen, a new trial will not be granted because the district attorney, by mistake, withholds important papers, unless the defendant uses due diligence to sustain them.² But a new trial has been granted where the defendant, having otherwise a good case, which would have resulted in an acquittal, was advised by his counsel that certain evidence which was admitted was not admissible against him, and was so taken by surprise,³ and where the counsel neglected to summon the witnesses whose names were given him by his client.⁴

§ 1820. **NEW TRIAL FROM UNEXPECTED BLUNDER OR CONFUSION OF WITNESS.** Where, as sometimes occurs, witnesses are mistaken in their testimony from temporary incapacity, new trials have been granted.¹ Relief, however, will only be afforded on clear proof of mistake by the witness, not where the party was in error as to what the

¹ See on this topic an article in 16 West. Jur. 281 (May, 1882); also: GA.—Hudson v. State, 76 Ga. 727; Darby v. State, 79 Ga. 63, 3 S. E. 663. ILL.—Wray v. People, 78 Ill. 212. KAN.—State v. Currens, 46 Kan. 750, 27 Pac. 140. MO.—State v. Dreher, 137 Mo. 11, 38 S. W. 567. N. Y.—People v. O'Brien, 4 Park. Cr. Rep. 203. TEX.—Augustine v. State, 20 Tex. 450.

Counsel assigned by court not satisfactory to defendant, not ground for new trial.—People v. Murry, 52 Mich. 288, 17 N. W. 483.

Counsel for defense too ill, in the opinion of some spectators, to try the case, not ground for a new trial.—Vowells v. Com., 15 Ky. L. Rep. 574.

Drunkenness of counsel during

trial, not ground for a new trial.—O'Brien v. Com., 115 Ky. 608, 74 S. W. 666; Territory v. Clark, 13 N. M. 59, 79 Pac. 708.

² Supra, § 1804.

³ State v. Bengt, 61 Iowa 658, 17 N. W. 100; State v. Gunter, 30 La. Ann. 536; Babb v. State, 8 Tex. App. 173; State v. Williams, 27 Vt. 824; supra, § 1532.

⁴ State v. Lewis, 9 Mo. App. 321.

As to treachery of counsel, see, supra, § 1532.

In capital case, where defendant confides in his attorney to summon the witnesses in his defense, but he fails or neglects to do so, and the trial court orders the trial to proceed, a new trial will be granted.—State v. Lewis, 9 Mo. App. 321.

¹ Supra, § 1805; Scofield v. State, 54 Ga. 635; De Giou v. Dover, 2

witness would prove;² nor will the court hear evidence to show that a witness used expressions after trial contradicting his testimony in court.³ At the same time, when a party has been surprised by mistakes in testimony at the trial which he had no reason to expect, and which, if he had had time, he could readily have corrected, justice requires that a verdict obtained in this way, if manifestly unfair, should be revised.⁴

§ 1821. — BUT NOT MISTAKE OF JURY AS TO PUNISHMENT. If the error is not attributable to misconduct of themselves, or to misdirection of court, it is no ground that the jury rendered their verdict under a mistake as to the degree of punishment the court could inflict.¹

10. *Surprise.*

§ 1822. SURPRISE, WHEN GENUINE AND PRODUCTIVE OF INJUSTICE, GROUND FOR NEW TRIAL. Where a party or his counsel has been taken by surprise, in the course of a cause, by some accidental circumstance, which could not have been foreseen, in which no laches could be ascribed to either of them, a new trial will be awarded, if the court think the verdict against the weight of evidence properly admissible.¹ Thus, a new trial will be granted where the plaintiff is surprised by the testimony of his own witnesses, who appear to have been tampered with;² where a witness has been so much disconcerted as to be unable to

Ans. 517; *Richardson v. Fisher*, 1 Bing. 145, 8 Eng. C. L. 444.

² *Hewlett v. Cruchley*, 5 Taunt. 277, 1 Eng. C. L. 149, 128 Eng. Repr. 969.

³ *Com. v. Randall*, Thach. C. C. (Mass.) 500; *R. v. Whitehouse*, 18 Eng. L. & Eq. Rep. 105; 1 Dears. C. C. 1; *supra*, § 1810.

⁴ See, *supra*, § 1805.

¹ *People v. Lee*, 17 Cal. 656. But see, *supra*, §§ 1782-1788.

¹ *State v. Simlen*, 36 La. Ann. 923; *Hodde v. State*, 8 Tex. App. 382; *Jackson v. State*, 48 Tex. Cr. Rep. 373, 88 S. W. 239; *State v. Williams*, 27 Vt. 724; *Hilliard on New Trials* (1873) 51.

See, also, cases cited, § 1819.

² *Todd v. State*, 25 Ind. 212; *Peterson v. Barry*, 4 Binn. (Pa.) 481. See, *supra*, § 1743.

testify at the trial;³ where a material witness, regularly subpoenaed and in attendance, absents himself shortly before the case is called;⁴ and where, in a case of seduction, the principal witness lays the seduction on a day which the defendant has no reason to anticipate, being at a time when he was absent from the place, and could easily prove an alibi.⁵

§ 1823. — **SO OF UNDUE HASTE IN HURRYING ON TRIAL.** New trials will also be granted in cases where the trial was hurried on in such haste as to give the defendant no time to prepare for his defense, provided in the motion for a new trial a substantial defense be disclosed.¹ But mere want of preparation, arising from the defendant having been in prison, is no ground for a new trial.²

§ 1824. — **BUT ABSENCE OF WITNESS NO GROUND, WHEN TESTIMONY IS CUMULATIVE.** Sudden sickness, and consequent absence of a material witness, is no ground for a new trial when the testimony to be established by such witness was proved by other parties.¹

§ 1825. **ORDINARY SURPRISE AT EVIDENCE NO GROUND.** The mere fact of a party being surprised by the introduction

³ *Ainsworth v. Sessions*, 1 Root (Conn.) 175. See, *supra*, §§ 1743, 1820.

⁴ *Ruggles v. Hall*, 14 Johns. (N. Y.) 112.

⁵ *Sargent v. ———*, 5 Cow. (N. Y.) 106.

As to what cases the defendant can be relieved in, on the ground of after-discovered evidence of the incompetency or bias of witnesses, see, *supra*, § 1795 et seq.

¹ See *State v. Boyd*, 37 La. Ann. 781; *Valle v. State*, 9 Tex. App. 57, 35 Am. Rep. 719.

An indictment was found November 21, for a murder commit-

ted on the 11th of October previous. The defendant was put upon trial immediately and convicted, and sentenced for murder in the second degree. The case did not appear to be an aggravated one. The defendant made affidavit that he had been surprised by the evidence, and had had no time for a proper defense. It was held, in *Indiana*, that under these and other circumstances of the case, a new trial should have been granted.—*Rosencrants v. State*, 6 Ind. 407; *supra*, § 1535.

² *Yanez v. State*, 20 Tex. 656.

¹ *Supra*, §§ 1523, 1535; *Young v. Com.*, 45 Va. (4 Gratt.) 550.

of unexpected evidence, however, is no ground for a new trial,¹ especially when the affidavit does not show that the "surprising" evidence was not true,² and that no effort was made on trial for continuance to meet the surprise.³

§ 1826. — NOR IS UNEXPECTED BIAS OF WITNESS. In general, as has been seen, the production of unexpected evidence impeaching the character of a witness is no reason to set aside the verdict.¹

1 Supra, § 1743. ARK.—Petty v. State, 76 Ark. 515, 89 S. W. 465. GA.—Hope v. State, 124 Ga. 438, 52 S. E. 747. IND.—Thalke v. State, 50 Ind. 355. KY.—Curry v. Com., 25 Ky. L. Rep. 281, 74 S. W. 1077; Com. v. Bavarian Brewing Co., 26 Ky. L. Rep. 121, 80 S. W. 772. LA.—State v. McQueen, 108 La. 410, 32 So. 412. MINN.—State v. Fay, 88 Minn. 269, 92 N. W. 978. N. H.—Willard v. Wetherbee, 4 N. H. 118. S. C.—State v. Head, 60 S. C. 516, 39 S. E. 6. TEX.—Sinmacher v. State, 43 S. W. 512; White v. State, 40 Tex. Cr. Rep. 366, 50 S. W. 705; Brown v. State, 56 S. W. 56. VA.—Wholford v. Com., 45 Va. (4 Gratt.) 553. W. VA.—State v. Schnelle, 24 W. Va. 802; State v. Smith, 24 W. Va. 814. ENG.—R. v. Hollinberry, 6 Dow. & R. 345, 16 Eng. C. L. 262, 4 Barn. & C. 329, 10 Eng. C. L. 601.

Ability to produce testimony which will probably change the verdict must be shown to warrant granting a new trial on ground of surprise at evidence.—Com. v. Bavarian Brewing Co., 26 Ky. L. Rep. 421, 80 S. W. 772.

Affidavit by defendant that he was surprised at testimony of prosecutrix, and that much of it was untrue, held sufficient to warrant the granting of a new trial.—State v. Halford, 17 Utah 475, 54 Pac. 819.

Counsel's ignorance witness enemy of accused, and that wife of accused would testify in certain way held not ground for new trial because of surprise.—Leslie v. State (Tex. Cr.), 49 S. W. 73.

Postponement not having been asked, fact that witness testified differently from what he informed counsel for defense he would testify, not ground for new trial.—Stewart v. State (Tex. Cr.), 49 S. W. 95.

Surprise testimony impeached at the trial, no ground for new trial.—McNeal v. State (Tex. Cr.), 43 S. W. 792.

2 People v. Jocelyn, 29 Cal. 562.

3 Hancoy v. State, 68 Ga. 612; Webb v. State, 9 Tex. App. 490; Childs v. State, 10 Tex. App. 183; Cunningham v. State, 20 Tex. App. 162.

1 Supra, §§ 1741, 1810; Com. v. Drew, 4 Mass. 391; Com. v. Green, 17 Mass. 515.

11. *Irregularity in Summoning of Jury.*

§ 1827. ORDINARILY DEFECTS IN JURY PROCESS NO GROUND. Generally speaking, under the statutes, the mistake or informality of the officers charged with summoning, returning, and impaneling the jury, will be no ground for a new trial, unless there has been fraud or collusion, or material injury to the defendant.¹ Unless matter of rec-

¹ GA.—*Dover v. State*, 109 Ga. 485, 34 S. E. 1030. LA.—*State v. Duperier*, 115 La. 478, 39 So. 455. MASS.—*Amherst v. Hadley*, 18 Mass. (1 Pick.) 38. MISS.—*Taylor v. State*, 30 So. 657. MO.—*State v. Riddle*, 179 Mo. 287, 78 S. W. 606. N. Y.—*People v. Ransom*, 7 Wend. 417. PA.—*Dewar v. Spence*, 2 Whart. 211; *Com. v. Chauncey*, 2 Ashm. 90; *Com. v. Gallagher*, 4 Penn. Law Jour. 511, 2 Clark 86. TEX.—*Margraves v. State*, 50 S. W. 1016. ENG.—*R. v. Hunt*, 4 Barn. & Ald. 430, 6 Eng. C. L. 547.

Inability of sheriff to find and serve all the persons named in a special venire, no ground for granting a new trial.—*Taylor v. State* (Miss.), 10 So. 657.

Initials of Christian names of two or more of the jurors is an irregularity, but insufficient to warrant the setting aside of a verdict and granting a new trial.—*State v. Duperier*, 115 La. 478, 39 So. 455.

Error in excusing a juror not ground for a new trial.—*State v. McGraw*, 6 Ida. 635, 59 Pac. 178. See *Ellis v. State*, 114 Ga. 36, 39 S. E. 881.

Juror serving not one named on jury list, where party serving is one summoned and the person intended, new trial in discretion of

court.—*Chadwick v. United States*, 72 C. C. A. 343, 141 Fed. 225. See *State v. Brinte*, 4 Penn. (Del.) 551, 34 S. E. 1017.

Negro on trial for murder not entitled to a new trial on the ground that the venire from which the jury was drawn were all white men, when there is nothing in the record showing the race of the jurors.—*Merriweather v. Com.*, 118 Ky. 870, 82 S. W. 592. See *Garnett v. State* (Tex. Cr.), 60 S. W. 675.

Objection for irregularities in summoning jury can not be raised for first time on motion for a new trial.—*Margraves v. State* (Tex. Cr.), 50 S. W. 1016; *Garnett v. State* (Tex. Cr.), 60 S. W. 675.

As to grand jury, see, *supra*, §§ 1271 et seq., § 1277.

In New York, under the Revised Statutes, it was held that a non-compliance of the clerk to put the names of all the persons returned as jurors in a box, from which juries are to be drawn, is not fatal.—*People v. Ransom*, 7 Wend. (N. Y.) 417.

As to Pennsylvania, by Act of 21st February, 1814, see *Com. v. Chauncey*, 2 Ashm. (Pa.) 90; *Com. v. Gallagher*, 4 Penn. Law Jour. 511, 2 Clark (Pa.) 86.

It has been held, under this act, that standing mute is as much a

ord, such defects can not be noticed in error² or in arrest of judgment.³ But it is a good ground for new trial at common law that jurors have been improperly chosen, or chosen by an unauthorized officer, or that the officers in attendance had permitted irregularities.⁴ Where one who had been challenged on the principal panel was afterward sworn in under another name as a talesman;⁵ and where talesmen who were incompetent, or who had not been drawn according to the statute, were summoned and returned, and placed on the trial, new trials have been ordered.⁶ If the party, however, is aware, or could by due diligence have been aware, of the objections to a juror or talesman, and neglects his challenge, no new trial will be granted;⁷ as formal objection that the juror had not been drawn and returned according to law comes too late after the verdict.⁸ Thus, where one of the jury had been drawn more than twenty days before the time when the venire was made returnable, exception not having been made until after verdict, a new trial was refused.⁹ And a new trial will not be granted because the clerk, in calling over the jury, pursued the order in which

waiver as pleading to the issue.—*Com. v. Dyot*, 5 Whart. (Pa.) 67.

² *Cross v. State*, 63 Ala. 40; *State v. Degonia*, 69 Mo. 485; *Holles v. State*, 8 Tex. App. 620.

Error lies in such case for illegal summoning of jury.—*Bach v. State*, 38 Ohio St. 664; *R. v. O'Connell*, 11 Cl. & F. 155, 8 Eng. Repr. 1061.

³ *Supra*, § 1699.

⁴ As a signal illustration of this, see *R. v. O'Connell*, 11 Cl. & F. 155, 8 Eng. Repr. 1061; *Pamph. R. Arm. & T.*; *Lord Denman's Life*, II, 172.

As to challenging and quashing in such cases, see, *supra*, § 1641.

⁵ *Parker v. Thornton*, 2 Ld. Raym. 1410, 92 Eng. Repr. 418; though see *R. v. Hunt*, 4 B. & A. 430. See, *supra*, § 1786.

⁶ *Kennedy v. Williams*, 2 Nott. & McC. L. (S. C.) 79. See *Com. v. Gallagher*, 4 Penn. Law Jour. 520; *R. v. Tremaine*, 7 Dow. & R. 684, 16 Eng. C. L. 318, sub nom. *R. v. Tremearne*, 5 Barn. & C. 254; *supra*, § 1786.

⁷ *Supra*, § 1785; *State v. Jackson*, 27 Kan. 581, 41 Am. Rep. 424; *Howland v. Gifford*, 18 Mass. (1 Pick.) 43; *R. v. Sullivan*, 1 P. & D. 96, 8 Ad. & El. 831, 35 Eng. C. L. 865.

⁸ See, *supra*, § 1785.

⁹ *State v. Hascall*, 6 N. H. 352.

they were impaneled, instead of that in which their names appeared in the venire.¹⁰ Nor is it ground for new trial that jurors and witnesses in a criminal case are sworn by an acting deputy clerk, who has not been appointed regularly or sworn in.¹¹

§ 1828. — AND SO OF IRREGULARITIES IN FINDING BILL. After the verdict, irregularities in the summoning of the grand jury, or in the finding of the bill, not appearing on the record, can not be noticed on a motion for a new trial.¹

§ 1829. — OTHERWISE AS TO AFTER-DISCOVERY OF INCOMPETENCY OF JUROR. The question of subsequent discovery of incompetency of a juror has been already discussed.¹

§ 1830. PREJUDICE IN JURY—POPULAR EXCITEMENT. It is also settled, as we have already seen, that objections to the competency of jurors, on the ground of preadjudication, must be taken before empaneling, or at the time when the party becomes first acquainted with the objection.¹ Nor is popular excitement at the time of the trial in itself a ground for new trial,² unless the jury be swept away by it into an unjust verdict.³

IV. AT WHAT TIME MOTION MUST BE MADE.

§ 1831. MOTION MUST BE PROMPT. An application for a new trial can not, in general, be made after an applica-

¹⁰ State v. Slack, 1 Bailey L. (S. C.) 330.

¹¹ Mobley v. State, 46 Miss. 501.

¹ Supra, § 1279.

¹ Supra, §§ 1786 et seq.

The clerk, in drawing a juror, called a name which was answered by mistake by a juror in attendance, who afterwards, bona fide, took his seat and served, it was

held that the defendant not being injured by the mistake had no ground for new trial.—Com. v. Parsons, 139 Mass. 381, 31 N. E. 767.

¹ Supra, § 1784.

² Brinkley v. State, 54 Ga. 71; Com. v. Flanigan, 7 Watts & S. (Pa.) 418; supra, § 1784.

³ People v. Acosta, 10 Cal. 195.

tion for arrest in the judgment;¹ though there are cases in which, if it appear that manifest injustice will ensue from a strict observance of the rule, the court will waive the formality, and admit the defendant to a rehearing;² and now the Court of Queen's Bench, in its discretion, hears motions in arrest of judgment before applications for a new trial.³ In extreme cases, the court, especially if the punishment be capital, will hear the motion even after sentence imposed.⁴ But the ordinary practice requires notice of the motion to be given within four days after verdict.⁵ This, however, may be at discretion enlarged,⁶ unless otherwise prescribed by statute.⁷

Whether the defendant's presence is essential to the arguing of the motion has been already considered.⁸

§ 1832. WHEN VERDICT SET ASIDE NEW TRIAL IS AT ONCE ORDERED. Where a verdict has been set aside in a criminal case as imperfect, a *venire facias de novo* may at once be awarded, and a new trial had, either on the same indictment or another.¹

¹ 1 Chitty Cr. L. 658; *Respublica v. Lacaze*, 2 U. S. (2 Dall.) 118, 1 L. Ed. 314.

² *People v. McKay*, 18 Johns. (N. Y.) 212; *R. v. Gough*, 2 Doug. 791, 99 Eng. Repr. 503; *R. v. Holt*, 5 T. R. 436, 101 Eng. Repr. 245; *Bac. Abr. Trial (L.)* 1; *Chitty Cr. L.* 658.

³ *R. v. Rowlands*, 2 Den. C. C. 386. See 6 T. R. 627; *Bac. Abr. Trial (L.)* 1.

⁴ *Com. v. McElhaney*, 111 Mass. 439; *United States v. Malone*, 20 Blatchf. 137, 9 Fed. 897.

Compare: *Willis v. State*, 62 Ind. 391.

⁵ *R. v. Newman*, 1 El. & Bl. 268, 72 Eng. C. L. 267, *Dears C. C.* 85.

In *Com. v. Cannon*, 10 Phila. 456, it was said that the motion must be made immediately after verdict.

⁶ GA.—*Ross v. State*, 65 Ga. 127. IND.—*Burk v. State*, 72 Ind. 392; *Smith v. State*, 64 Ind. 439. TEX.—*Bullock v. State*, 12 Tex. App. 42; *Hart v. State*, 21 Tex. App. 163, 17 S. W. 421. VA.—*Com. v. Gibson*, 4 Va. (2 Va. Cas.) 70.

A rule can not be granted after expiration of the term.—See *State v. Alphin*, 81 N. C. 566.

⁷ *Holmes, Ex parte*, 21 Neb. 324, 32 N. W. 69.

⁸ *Supra*, § 1484.

¹ *Com. v. Gibson*, 4 Va. (2 Va. Cas.) 70.

V. AS TO WHOM MOTION APPLIES.

§ 1833. ANY DEFENDANT MAY MOVE. Any defendant, within the proper time, may apply for a new trial.

§ 1834. DEFENDANT MUST BE PERSONALLY IN COURT. The defendant, according to the old practice, must be personally in court at the application;¹ and where there are several defendants, all of them who have been convicted must be actually present, unless a special ground be laid for dispensing with the general rule.² But such presence, even in felonies, is not always regarded as essential.³

§ 1835. NEW TRIAL MAY BE GRANTED AS TO ONE OF SEVERAL. Where some of the defendants have been convicted and others acquitted, a new trial may be granted to the former, without impeaching the verdict so far as it relates to the latter.¹ It is likewise, however, when the conviction of the one is an essential condition of the conviction of the other.²

VI. WHEN THE CONVICTION IS FOR ONLY PART OF THE INDICTMENT.

1. *Acquittal on One of Two Counts.*

§ 1836. NEW TRIAL ONLY ON CONVICTED COUNTS. When there has been an acquittal on one count and a conviction on another, and the counts are for distinct offenses, a new trial can only be granted on the count on which there has been a conviction; and it is error, on a second trial, to put the defendant on trial on the former.¹ Where the in-

¹ Supra, § 1484; 2 Burr. 930; 2 Stra. 844, 1227; 1 W. Black. 209.

² R. v. Fielder, 2 Dow. & R. 46, 16 Eng. C. L. 72; R. v. Teal, 11 East 307; 1 Sess. Cas. 428; Com. Dig. Indictment, N.; 1 Chitty Cr. L. 659.

³ Supra, § 1484.

¹ Seborn v. State, 51 Ga. 164;

Com. v. Roby, 29 Mass. (12 Pick.) 496; Kemp v. Com., 59 Va. (18 Gratt.) 969; R. v. Mawbey, 6 T. R. 620, 638, 101 Eng. Repr. 736, 746.

² Jackson v. State, 54 Ga. 439; Dutcher v. State, 16 Neb. 30, 19 N. W. 612 (a case of riot). See, supra, § 1688.

¹ Supra, §§ 1390, 1725. ILL.—

dictment contains several counts charging distinct offenses, a conviction of accused on some of the counts without saying anything about the other counts in the indictment, we have already seen, is equivalent to an acquittal on the counts regarding which the verdict is silent;² and on reversal of the conviction the accused can not, under the rule as above laid down, be retried upon the counts as to which the verdict was silent.³ It has been, however, ruled that where an indictment is for but one offense, charged in various ways, and the defendant is convicted upon some counts and acquitted as to others, the granting of a new trial on his motion opens

Logg v. People, 8 Ill. App. 99.
 IND.—*Reynolds v. State*, 64 Ind. 498. IOWA—*State v. Mallings*, 11 Iowa 239. KAN.—*State v. McNaught*, 36 Kan. 624, 14 Pac. 277. LA.—*State v. Fritz*, 27 La. Ann. 360. MISS.—*Morris v. State*, 16 Miss. (8 Smed. & M.) 762. MO.—*State v. Kettleman*, 35 Mo. 105; *State v. Bruffey*, 75 Mo. 389. PA.—*Hollister v. Com.*, 60 Pa. St. 103. S. C.—*State v. Commis*, 3 Hill L. 239. TENN.—*Campbell v. State*, 17 Tenn. (9 Yerg.) 333, 30 Am. Dec. 417; *Esmon v. State*, 31 Tenn. (1 Swan) 14. VT.—*State v. Kittle*, 2 Tyl. 471. VA.—*Lithgow v. Com.*, 4 Va. (2 Va. Cas.) 297; *Stuart v. Com.*, 69 Va. (28 Gratt.) 950. FED.—*United States v. Davenport*, 1 Deady 264, Fed. Cas. No. 14920.

Compare: Remarks, supra, § 1725, and *State v. Stanton*, 23 N. C. (1 Ired. L.) 424; *Leslie v. State*, 18 Ohio St. 390.

As to right to retry on count on which accused has been acquitted on reversal of conviction on another count, see note 27 Am. Dec. 480.

² See, supra, § 1673.

³ ARK.—*Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154 (conviction of murder in second degree bars retrial for murder in first degree). CAL.—*People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620, and *People v. Smith*, 134 Cal. 453, 66 Pac. 669 (conviction of manslaughter is acquittal of murder, and bars retrial for latter). ILL.—*Brennan v. People*, 15 Ill. 511 (conviction of manslaughter acquits of murder, and there can be no retrial for latter). IOWA—*State v. Tweedy*, 11 Iowa 350 (verdict of manslaughter bars retrial for murder). MO.—*State v. Ross*, 29 Mo. 32 (conviction of second degree murder bars retrial for murder in first degree). TEX.—*Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550 (conviction of murder in second degree bars retrial for murder in first degree). WIS.—*State v. Belden*, 33 Wis. 120, 14 Am. Rep. 784 (in a murder case retrial should be limited to the degree of homicide of which accused was convicted). FED.—*King v. Missouri*, 107 U. S. 221, 27 L. Ed. 506,

the whole merits,⁴ though this view can only be sustained in cases in which the verdict on the counts on which there was an acquittal was directed in consequence of formal defects.

2. *Conviction of Minor Offense Included in Major.*

§ 1837. CONVICTION OF MINOR IS ACQUITTAL OF MAJOR. Where two offenses are included in one count, there has been a distinction taken which though specious is unsound. It has been held that where one count includes burglary and larceny, after acquittal of the greater offense but conviction of the less, and when a new trial is obtained, the whole case is reopened, and the defendant exposed on the second trial to the double charge.¹ But the true view is, that a conviction of the minor offense operates as an acquittal of the major.² But to enable this defense to be interposed, it must be specially pleaded.³

The law in reference to new trials after convictions for manslaughter, or murder in the second degree, has already been stated.⁴

2 Sup. Ct. Rep. 443 (constitutional provision permitting retrial for first degree murder after conviction of murder in second degree, as to offense before its adoption is *ex post facto*).

⁴ *Leslie v. State*, 18 Ohio St. 390; *Jarvis v. State*, 19 Ohio St. 585. But see, *supra*, § 1725.

¹ See, *supra*, §§ 1396, 1675, 1726.

² *Supra*, §§ 1396, 1726; *Bell v. State*, 48 Ala. 684, 17 Am. Rep. 40; *Lewis v. State*, 51 Ala. 1; *Com. v. Herty*, 109 Mass. 348; *People v. Knapp*, 26 Mich. 112; *State v. Martin*, 30 Wis. 216, 11 Am. Rep. 567, and other cases cited *supra*, § 1396.

Under the Missouri constitution it has been held that after setting aside a conviction of murder in the second degree on an indictment for murder in the first degree, the defendant can be held for murder in the first degree.—*State v. Simms*, 71 Mo. 538; *State v. Anderson*, 89 Mo. 312, 1 S. W. 135; *supra*, § 1396.

And so as to burglary and larceny.—*State v. Bruffey*, 75 Mo. 389; *State v. Martin*, 76 Mo. 337.

³ *Supra*, §§ 1396, 1413; *Jordan v. State*, 81 Ala. 20, 1 So. 577.

⁴ *Supra*, §§ 1396-1403, 1726. See 1 *Kerr's Whart. Crim. Law*, § 674.

VII. BY WHAT COURT NEW TRIAL MAY BE GRANTED.

1. *Appellate Courts.*

§ 1838. APPELLATE COURT MAY REVISE EVIDENCE FROM NOTES. At common law the court trying the case is the sole tribunal by which a new trial can be granted; and its refusal so to do, being matter of discretion, is no ground for a writ of error.¹ In most of the states, however, provision is made for obtaining revision by an appellate court.² When such a rehearing is had, the appellate court is not bound to re-examine the witness and hear the evidence verbatim, but, when there is no official stenographer, may hear the material facts proved, and the evidence adduced at the trial, from the trial court notes, aided by those of the counsel on both sides.³

2. *When Judge Trying Cause Dies or Leaves Office.*

§ 1839. CONFLICT OF OPINION AS TO WHETHER SUCCESSOR OF JUDGE CAN HEAR MOTION. In the Circuit Court of the United States sitting in Philadelphia, it has been held that where the judge trying a case died pending a motion for a new trial, his successor will decline hearing the case, and will grant a new trial.¹ But in Wisconsin it is said that a defendant can be sentenced by a judge succeeding in office the judge before whom the trial was had.²

VIII. IN WHAT FORM.

§ 1840. RULE TO SHOW CAUSE TO BE FIRST GRANTED. Upon ground prima facie sufficient, the court, on application,

¹ Supra, § 1713; infra, § 1843; Lester v. State, 11 Conn. 415.

² See, infra, §§ 1843, 1869, 1870.

³ Jones' Case, 28 Va. (1 Leigh) 598; infra, § 1840.

¹ State v. O'Kelly, 88 N. C. 600; State v. Randall, 88 N. C. 611; Crim. Proc.—143

United States v. Harding, 1 Wall. Jr. 127, Fed. Cas. No. 15301; supra, § 1452; infra, § 1871.

² State v. Abram, 4 Ala. 272; State v. Shea, 95 Mo. 85, 8 S. W. 409; Moett v. People, 85 N. Y. 373; Pegalow v. State, 20 Wis. 61.

Compare: infra, § 1871.

will award a rule to show cause why a new trial should not be granted.¹ On this, in England, the puisne judge of the court applies to the judge who tried the case, unless he be one of the judges of the court hearing the motion, for a report of the trial, and a statement of his opinion respecting its merits.² If he signify his dissatisfaction, the remedy prayed for is usually allowed; if he declare his concurrence with the verdict, it is commonly refused; but if he merely report the evidence, without giving any decided and satisfactory opinion, the court will admit the question to be argued before them.³ If they find there is no ground for the application, they will discharge the rule; but if solid ground be shown, they make it absolute.⁴

§ 1841. **MOTION MUST STATE REASONS.** The motion should state specifically the reasons relied on by the party making it,¹ and are governed by the same rule in criminal as

¹ Bul. N. P. 327; Tidd. 884; Hand. Prac. 12.

As to Texas practice, see Bullock v. State, 12 Tex. App. 42. See Ayers v. State, 12 Tex. App. 450.

² Bul. N. P. 327; Tidd. 884.

³ R. T. H. 23; Barnes 439. See Simpson v. Norton, 45 Me. 281.

⁴ 1 Chitty Cr. L. 660.

¹ Hilliard on New Trials (1873) 28; supra, § 1795.

Dual motion asking the court (1) to set aside and arrest a judgment, and (2) to grant a new trial, assigning appropriate grounds for both remedies, must be treated either as a motion in arrest of judgment, or as a motion for a new trial; it can not be considered in its dual form as including both remedies.—State v. Mann, 13 Tex. 61.

Motion for new trial being ap-

plication for an order, or rule to show cause, made viva voce to a court or judge, the court's attention must be called to it and a motion made that it be granted; it is not sufficient merely to make out and file a written application therefor.—People v. Ah Sam, 41 Cal. 645. See Brownell v. Superior Court, 157 Cal. 703, 710, 109 Pac. 91, 94.

—Filing of written statement of grounds, or objections, does not constitute a "motion."—See Marenco (City of) v. Eichler, 245 Ill. 49, 91 N. E. 759.

Motion for new trial in form of an argument, is improper.—Jackson v. State (Tex. Cr.), 51 S. W. 389.

Under statute, errors relied on for new trial may be required to be specified in writing.—Hopkins v. Com., 66 Ky. (3 Bush) 480.

in civil causes.² To simply say that the court erred in refusing to admit, or in admitting competent or incompetent evidence, is insufficient. The evidence in question must be specified, and the name of the witness, when the evidence is given, stated.³ When the ground is after-discovered evidence, the motion must be supported by affidavits of the witnesses to be produced.⁴

IX. COSTS.

§ 1842. **COSTS MAY AWAIT SECOND TRIAL.** The practice as to the imposition of costs is the same in criminal cases as in civil.¹ And the court, even when an indictment after verdict is removed by certiorari to a higher court on ground of surprise, may direct that the costs shall await the result of the second trial.²

X. ERROR.

§ 1843. **ERROR DOES NOT USUALLY LIE TO ACTION OF COURT.** We have seen that at common law refusing a new trial is not ground for error.¹ When, however, by statute, error in such case lies, the refusal of the court below will not be reversed unless it should affirmatively and plainly appear to the appellate court that the decision of the court below was wrong.²

² Grayson v. Com., 47 Va. (6 Gratt.) 712.

³ ARK.—Runnels v. State, 28 Ark. 121. CAL.—People v. Ah Sam, 41 Cal. 645. IND.—Cheek v. State, 37 Ind. 533. KAN.—State v. Kellerman, 14 Kan. 135.

See, also, supra, § 1795.

⁴ Supra, § 1795.

As to requisites of motion for new trial on ground of newly-discovered evidence, see State v. Schorn, 12 Mo. App. 590.

¹ R. v. Ford, 1 Nev. & M. 776,

29 Eng. C. L. 548; Hilliard on New Trials (1873) 65.

² R. v. Whitehouse, Dears. C. C. 1.

¹ Supra, § 1713, where the cases are given; and also, supra, § 1838; State v. Mackay, 12 Ore. 154, 6 Pac. 648.

² COLO.—Petite v. People, 8 Colo. 118, 9 Pac. 622; Bachman v. People, 8 Colo. 472, 9 Pac. 42. D. C.—United States v. Bicksler, 1 Mack. 341. GA.—Smith v. State, 67 Ga. 769. N. M.—United States v. Lewis, 2 N. M. 459. TENN.—

Granting a motion for a new trial will not be reversed in error in any but extreme cases.³

State v. Collins, 83 Tenn. (15 Lea) 434. VA.—Grayson v. Com., 47 Va. (6 Gratt.) 723; Read v. Com., 63 Va. (22 Gratt.) 924.

See, also, supra, §§ 1713, 1838.

In Pennsylvania, it is said that refusal of a new trial is not sub-

ject of error except in capital cases.—McConkey v. Com., 101 Pa. St. 416.

But see, qualifying this, McGinnis v. Com., 102 Pa. St. 66.

³ People v. Conroy, 97 N. Y. 62, 2 N. Y. Cr. Rep. 565.

CHAPTER XCVIII.

SENTENCE.

I. INTRODUCTORY.

§ 1844. In general.

II. DEFENDANT TO BE ASKED IF HE HAS ANYTHING TO SAY.

§ 1845. In felonies this is essential.

III. DISTRIBUTION OF PUNISHMENT AS TO COUNTS.

§ 1846. On general verdict, superfluous counts may be got rid of by nolle prosequi.

§ 1847. — And so even if there is a bad count.

§ 1848. Conflict as to general sentence when some counts are bad.

§ 1849. A verdict and judgment as to one count disposes of the others.

§ 1850. Successive punishments may be given on successive counts.

§ 1851. — But not where counts are not for distinct offenses.

IV. DEFENDANT'S PRESENCE ESSENTIAL.

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§ 1853. Court may amend or stay during term.

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§ 1854. On verdict of guilty on indictment for murder, court will sentence for second degree.

§ 1855. Defendant to be asked as to sentence, and may reply.

§ 1856. Sentence depends on statute.

§ 1857. Pregnancy is ground for respite.

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Discretion allowed to courts.

§ 1859. Fine and imprisonment are the usual common-law penalties.

§ 1860. "Cruel and unusual" punishments unlawful.

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§ 1862. Fines may be collected by execution.

§ 1863. Abatement a form of execution.

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§ 1869. By statute, appellate court may sentence or may reverse for error.

§ 1870. In capital and other cases record remanded to court below for execution.

XI. SENTENCE BY SUCCEEDING JUDGE.

§ 1871. Such sentence may be regular.

XII. SUCCESSIVE IMPRISONMENTS.

§ 1872. In general.

§ 1873. Prisoner may be brought up for second trial by habeas corpus.

§ 1874. A second imprisonment begins at termination of first.

§ 1875. An escaped prisoner may be sentenced for escape in like manner.

XIII. WHEN SEVERER PUNISHMENT IS ASSIGNED TO SECOND OFFENSE.

§ 1876. Such statutes constitutional.

§ 1877. In such cases, prior conviction should be averred.

§ 1878. Former conviction must be legal—Foreign conviction insufficient.

§ 1879. Conviction to be proved by record and identification.

§ 1880. Prosecution may waive first conviction.

§ 1881. Prior conviction not to be put in evidence until main issue is found against defendant.

XIV. DISFRANCHISEMENT AND INCAPACITATION.

§ 1882. Conviction a prerequisite.

§ 1883. — And so of forfeiture of office.

§ 1884. — And so of capacity as a witness.

XV. JOINT SENTENCES.

§ 1885. Joint defendants may each be punished to full amount—Several sentences.

XVI. BINDINGS TO KEEP THE PEACE.

§ 1886. Defendant, after verdict, may be bound over to keep the peace.

XVII. CONSIDERATIONS IN ADJUSTING SENTENCE.

§ 1887. Courts have usually large discretion.

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XVIII. EX POST FACTO PENALTIES.

§ 1891. How far unconstitutional.

XIX. BENEFIT OF CLERGY.

§ 1892. Now abolished.

I. INTRODUCTORY.

§ 1844. IN GENERAL. By the ordinary rules of court a defendant is allowed four days in which to move in arrest of judgment or for a new trial. To previous chapters the reader is referred for a discussion of these motions: it is proposed at present, on the supposition, either that they have been made and refused, or that a final judg-

ment has been entered against the defendant on demurrer, to consider the law bearing on the subject of sentence.¹

II. DEFENDANT TO BE ASKED IF HE HAS ANYTHING TO SAY, ETC.

§ 1845. IN FELONIES THIS IS ESSENTIAL. At common law, in all capital felonies, the practice has been for the clerk, before sentence is pronounced, to ask the defendant if he has anything to say why sentence should not be pronounced; and it is essential that it should appear on record that this was done.¹ In several states the rule is that in

¹ As to effect of excessive sentence, see *In re Taylor*, 7 S. D. 382, 58 Am. St. Rep. 843, 45 L. R. A. 136, 64 N. W. 253; *State v. Taylor*, 7 S. D. 550, 64 N. W. 548. See, also, *Shields v. People*, 132 Ill. App. 139; *State v. Barr*, 133 Iowa 134, 110 N. W. 280; *State v. Klock*, 48 La. Ann. 67, 55 Am. St. Rep. 259, 18 So. 957.

See, also, notes, 45 L. R. A. 136, and 55 Am. St. Rep. 259.

¹ *Supra*, § 1846; 1 Chitty Cr. L. 709; *Ld. Raym.* 1409. ALA.—*Mullen v. State*, 45 Ala. 43, 6 Am. Rep. 691; *Crocker v. State*, 47 Ala. 53. CAL.—*People v. Jung Qung Sing*, 70 Cal. 469, 11 Pac. 755; *People v. Walker*, 132 Cal. 137, 64 Pac. 133. LA.—*State v. Ikenor*, 107 La. 480, 32 So. 480 (in capital cases only). MISS.—*James v. State*, 45 Miss. 572. NEB.—*McCormick v. State*, 66 Neb. 337, 92 N. W. 606 (in all cases, under statutory provision). N. J.—*West v. State*, 22 N. J. L. (2 Zab.) 212. N. M.—*Territory v. Herrera*, 11 N. M. 129, 66 Pac. 523. N. Y.—*Messner v. People*, 45 N. Y. 1, 1 Cow. Cr. Rep. 348; *Safford v. People*, 1 Park. Cr. Rep. 474; *Graham v. People*, 63 Barb. 468. OKLA.—*Rhea v. United States*, 6 Okla. 249, 50 Pac. 992.

PA.—*Hamilton v. Com.*, 16 Pa. St. 121; *Dougherty v. Com.*, 69 Pa. St. 286; *McCue v. Com.*, 78 Pa. St. 185, 21 Am. Rep. 7; *Com. v. Preston*, 188 Pa. St. 429, 41 Atl. 534. ENG.—*R. v. Geary*, 2 Salk. 630, 91 Eng. Repr. 532; *R. v. Speke*, 3 Salk. 358, 91 Eng. Repr. 872.

See, also, *infra*, § 1855.

Failure of record to show prisoner asked if he had anything to say why judgment should not be pronounced against him, sentence must be reversed and prisoner remanded for sentence.—*McCune v. Com.*, 78 Pa. St. 185, 21 Am. Rep. 7.

Not ground for reversal.—*Lamb v. People*, 219 Ill. 390, 76 N. E. 576.

Observance of this formality is not essential, especially where objection is not made.—*Sarah v. State*, 28 Ga. 576; *State v. Avery*, Man. Unrep. Cas. (La.) 257; *State v. Cheney*, Man. Unrep. Cas. (La.) 394; *State v. Nagel*, 136 Mo. 45, 37 S. W. 821.

In New York, where the exemption that comes to the court in error does not show that the question was asked, a certiorari may be granted to theoyer and terminer to bring up the whole

all cases of felony the absence of such an averment will require the remittal by a court of error of the record to the trial court for a new sentence.² In other states the failure of the record in this respect has been held not to be ground for a reversal, though it is held that the form is one proper to be used.³ In some states the practice is dispensed with as an unnecessary formality.⁴ But this address is not to be viewed as an invitation to the defendant to bring forward additional motions in arrest of judgment, or for a new trial. These motions have, according to the usual practice, been already made and disposed of. The object of the address is to give the defendant the opportunity to personally lay before the court, statements which, by the strict rules of law, could not have been admitted when urged by his counsel in the due

record.—*Graham v. People*, 6 *Lans.* (N. Y.) 149.

In *Edwards v. State*, 47 *Miss.* 581, it was said that it was sufficient in error when the record averred that the court, "after hearing the defendant," proceeded to pass sentence.—See *State v. Fritz*, 27 *La. Ann.* 360; *State v. Hugel*, 27 *La. Ann.* 375.

Defendant must have been present in court during sentence.—See, *infra*, § 1846.

² *ALA.*—*Perry v. State*, 43 *Ala.* 21; but see *Spigner v. State*, 58 *Ala.* 421. *FLA.*—*Keech v. State*, 15 *Fla.* 591. *KAN.*—*State v. Jennings*, 24 *Kan.* 642. *NEB.*—*Dodge v. People*, 4 *Neb.* 220. *ORE.*—*State v. Lally*, 41 *Ore.* 366, 70 *Pac.* 396. *PA.*—*McCue v. Com.*, 78 *Pa. St.* 185, 21 *Am. Rep.* 7. *S. C.*—*State v. Trezevant*, 20 *S. C.* 363; *State v. Jefcoat*, 20 *S. C.* 383. *WYO.*—*Kinsler v. Territory*, 1 *Wyo.* 112.

See, also, *supra*, § 1716.

³ *Supra*, § 1486. *GA.*—*Grady v. State*, 11 *Ga.* 253; *Sarah v. State*, 28 *Ga.* 576. *LA.*—*State v. Taylor*, 27 *La. Ann.* 393, 21 *Am. Rep.* 561; *State v. Shields*, 33 *La. Ann.* 991. *MASS.*—*Jeffries v. Com.*, 87 *Mass.* (5 *Allen*) 145. *MISS.*—*Jones v. State*, 51 *Miss.* 713, 24 *Am. Rep.* 658. *MO.*—*State v. Ball*, 27 *Mo.* 324.

Question is not necessary in misdemeanors.—See *State v. Bradley*, 30 *La. Ann.* 326; *Turner v. United States*, 30 *U. S. App.* 108, 13 *C. C. A.* 443, 66 *Fed.* 287; same case 30 *U. S. App.* 104, 13 *C. C. A.* 445, 66 *Fed.* 289.

Omission can be cured by shortly afterwards calling defendant up, putting the question, and re-sentencing.—See *Reynolds v. State*, 68 *Ala.* 502.

⁴ *State v. Hoyt*, 47 *Conn.* 318 (a capital case); *Bressler v. People*, 117 *Ill.* 422, 8 *N. E.* 62 (a minor felony); *State v. Johnson*, 67 *N. C.* 59 (a capital case).

course of legal procedure; but which, when thus informally offered from man to man, may be used to extenuate guilt and to mitigate punishment.

III. DISTRIBUTION OF PUNISHMENT AS TO COUNTS.

§ 1846. ON GENERAL VERDICT, SUPERFLUOUS COUNTS CAN BE GOT RID OF BY NOLLE PROSEQUI. The more exact course, as has been stated, is for the jury, when the indictment contains several counts, to find separately on each count.¹ Should, however, the verdict be general, the prosecuting officer may enter a nolle prosequi on the counts which are superfluous, or the court may disregard them, treating their abandonment by the prosecuting officer as virtually a nolle prosequi.² On the count that remains judgment may be entered.³

§ 1847. — AND SO EVEN IF THERE BE A BAD COUNT. Suppose, however, one of the counts on which there has been a general verdict is bad. Here we have a conflict of opinion. Does such bad count vitiate the verdict? So it has been held.¹ But the prevalent and sounder opinion is that in such case the bad count can be got rid of by a nolle prosequi, or passed over by the sentencing court, if the record does not show that evidence, inadmissible under the good count, was admitted under the bad.² Logically, it is true, a single bad count vitiates the verdict, since it is impossible to exclude the hypothesis, on the bare record, that it was on that count that the verdict may have been based. But in cases of this class we are not limited to the bare record. The court trying the case knows to which counts the evidence was applicable, and to which the verdict was attached; and a court of error may well presume that the court below, in sentencing

¹ *Supra*, § 1669.

¹ *Supra*, § 1704.

² *Supra*, §§ 342, 1671, 1673, 1704.

² *Ibid.* Compare *supra*, §§ 342,

³ *Ibid.* See *State v. McDonald*, 1670-1682.

86 Mo. 539; *Young v. R.*, 3 T. R.

CS, 100 Eng. Repr. 475.

on the good counts, sentenced on counts to which the verdict was properly to be assigned.³ And, as a general rule, the presumption of regularity may be invoked to sustain the conclusion that the verdict went to the good counts; and this presumption is eminently applicable to cases in which the counts vary only in matters of form, or in which they are for successive stages of the same offense.⁴ But it will be error in such cases to impose a sentence exceeding that which could have been given on the good counts;⁵ though in some jurisdictions this is not ground for reversal, when the appellate court may by statute reduce the sentence.⁶ And it is not error when the sentence is less than could have been legally imposed.⁷

§ 1848. CONFLICT AS TO GENERAL SENTENCE WHEN ONE COUNT IS BAD. Another contingency arises when the jury find a verdict of guilty on each count, but on this verdict there is a general judgment and sentence in the court below. Should this judgment be reversed in error, if one of the counts turns out, on examination in the court of error, to be defective? The conflict of opinion on this point has been already noticed.¹

³ Supra, § 1704.

⁴ As sustaining view in text, see *Kane v. People*, 8 Wend. (N. Y.) 203; *People v. Gates*, 13 Wend. (N. Y.) 311; *People v. Costello*, 1 Den. (N. Y.) 83.

Presumption in error is that the evidence in the court below sustained the verdict.—*Doll v. Anderson*, 27 Cal. 248; *Slack v. People*, 80 Ill. 32; *Brennan v. Shinkle*, 89 Ill. 604.

⁵ Infra, § 1869.

⁶ Infra, §§ 1869, 1870; *Com. v. Kirby*, 56 Mass. (2 Cush.) 577.

⁷ Infra, § 1858.

¹ Supra, § 1704.

When two distinct offenses are

joined, and the defendant is found guilty on each count, whether there can be a lumping sentence on the whole, has been doubted.

In England the negative has been held.—*R. v. Robinson*, 1 Moo. 413.

In Massachusetts it has been said that where there is a verdict of guilty on each of several inconsistent counts, this is a mistrial, and there can be no *nolle prosequi*.—*Com. v. Fitchburg R. Co.*, 120 Mass. 372.

But usually when a greater and a less offense are joined in two counts, and there is a general verdict, the court sentences for the greater.—Supra, § 342.

§ 1849. A VERDICT AND JUDGMENT AS TO ONE COUNT DISPOSES OF THE OTHERS. Where there are several counts, a judgment and sentence upon one of these counts, no action being taken as to the others, disposes of the whole indictment, and operates as an acquittal upon or discontinuance of the other counts.¹ The effect of a general verdict on repugnant counts, or in cases where one count is defective, has been already considered.²

§ 1850. SUCCESSIVE PUNISHMENTS MAY BE GIVEN ON SUCCESSIVE COUNTS. Next have we to consider whether, when there is a series of counts, all good, on which there have been separate verdicts, the court trying the case can impose a separate sentence on each count. That this can be done we have numerous authoritative rulings.¹

¹ See cases, *supra*, § 1763.

General verdict of guilty rendered upon an indictment containing several counts for distinct offenses, and a sentence of imprisonment has been awarded upon some of the counts, under which sentence he has been imprisoned, the defendant can not, at a subsequent term, be brought up and sentenced over upon another count in the same indictment.—*Com. v. Foster*, 122 Mass. 317, 23 Am. Rep. 326.

As to this point, see, *infra*, § 1853, and *Com. v. Haskins*, 128 Mass. 60; *State v. Crank*, 2 Ball. L. (S. C.) 66, 23 Am. Dec. 117.

As to effect of general verdict of guilty under indictment or information containing several counts, see note 5 Am. Dec. 132.

² *Supra*, § 1671. See *Com. v. Haskins*, 128 Mass. 60.

As to Virginia practice, see *Richards v. Com.*, 81 Va. 110.

¹ *Chitty Cr. L.* 718; *Russ. on Cr.*

(4th Eng. ed.) 1030; *Archbold's C. P.* (17th ed.) 173. ARK.—*Dodd v. State*, 33 Ark. 517. ILL.—*Kroer v. People*, 78 Ill. 294; *Fletcher v. People*, 81 Ill. 116. KAN.—*State v. Chandler*, 31 Kan. 201, 1 Pac. 787. MO.—*Storrs v. State*, 3 Mo. 9. PA.—*Com. v. Gillespie*, 7 Serg. & R. 476; *Com. v. Sylvester*, *Brightly* 331; *Henwood v. Com.*, 52 Pa. St. 424; *Com. v. Birdsall*, 69 Pa. St. 482; though see *Com. v. Hartman*, 5 Pa. St. 60. S. C.—*State v. Thomas*, 14 Rich. 163. WIS.—*State v. Gummer*, 22 Wis. 441. FED.—*Peters, Ex parte*, 2 McC. 403, 12 Fed. 461. ENG.—*Douglas v. R.*, 13 Ad. & E. N. S. (13 Q. B.) 42, 66 Eng. C. L. 41; *Gregory v. R.*, 15 Ad. & E. N. S. (15 Q. B.) 974, 69 Eng. C. L. 973; *R. v. Wilkes*, 4 Burr. 2527, 19 Howell St. Tr. 1133; *R. v. Jones*, 2 Camp. 121; *R. v. O'Connell*, 11 Cl. & F. 155, 241, 8 Eng. Repr. 1060, 1094; *R. v. Castro*, L. R. 9 Q. B. Div. 350; *R. v. Castro*, L. R. 5 Q. B. Div. 490, 14 Cox C. C. 436,

Nor, when the offenses are distinct, is there any reason why, on convictions on each count, such convictions should not, in all cases where the counts are for a chain of cognate offenses, be treated as would be convictions on separate indictments. To require each distinct though cognate offense to be placed in a distinct indictment is to oppress the defendant, by loading him with unnecessary costs, and exposing him to the exhaustion of a series of trials, which the prosecution would encounter with unwaning strength, and with the benefit derived from a knowledge of its own case, and that of the defendant.² Vexatiously splitting civil actions into a multitude of independent suits has been held an indictable offense;³ and in suits for penalties, when the suits are unduly multiplied, rules for consolidation are granted as a matter of course.⁴ In criminal cases, from the peculiar degree of oppressiveness which would result from a splitting of prosecutions, the practice of uniting counts for cognate offenses has always been

6 App. Cas. 229, 14 Cox C. C. 546, 44 L. T. (N. S.) 350.

In Massachusetts it has been determined that when there has been such a conviction of distinct offenses, the court may impose a lumping sentence, consisting of a term of imprisonment such as could have been imposed had there been convictions on separate indictments.—*Charlton v. Com.*, 46 Mass. (5 Met.) 532; *Booth v. Com.*, 46 Mass. (5 Met.) 535; *Com. v. Hills*, 64 Mass. (10 Cush.) 530.

In *Charlton v. Com.*, supra, Mr. Justice Shaw says: "It is not necessary, in such cases, to award separate sentences, where they (the offenses) are so far alike that the whole of the judgment is but the sum of the several sentences to which the convict is liable."—See *Com. v. Cain*, 102 Mass. 487;

Com. v. Carey, 103 Mass. 214, and *Am. Law Rev.*, Oct., 1875, p. 172.

In Ohio it is said that on a general verdict of guilty on an indictment containing two counts for distinct misdemeanors, there may be a sentence on each count.—*Eldredge v. State*, 37 Ohio St. 191.

In South Carolina, in *State v. Williams*, 11 S. C. 288, it was held that where an offense was against two statutes it might be punished under each.

² Supra, § 344.

³ *Com. v. McCulloch*, 15 Mass. 247.

⁴ See, supra, §§ 335, 344 et seq.

As to practice under U. S. Rev. Stats., § 1024, 2 Fed. Stats. Ann., 1st ed., p. 337, 2 Fed. Stats. Ann., 2d ed., p. 676, see *Hibbs, Ex parte*, 26 Fed. 421.

encouraged, not merely because in this way the labor of the courts and the expenses of prosecution are greatly diminished, but because the interests of defendants are thereby subserved.⁵ In New York, however, in 1875, it was ruled by the Court of Appeal, that even where there are separate verdicts of guilty on each of several cognate counts, the defendant can only be sentenced on a single count.⁶ This, however, can only be sustained in jurisdictions in which by statute all imprisonments are to commence immediately on sentence.⁷

⁵ Rules to consolidate in such cases are granted in the federal courts, we have seen, *supra*, §§ 335 et seq.

⁶ *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, a case, according to Lord Selborne, *Castro v. R.*, 44 L. T. N. S. 354, L. R. 6 App. Cas. 241, based on an erroneous assumption.

Lord Watson says (*Ibid.* L. R. 6 App. Cas. at p. 249, 44 L. T. N. S. at p. 357, that according to that case "you can proceed against a defendant for several offenses in several indictments, but that if there be several offenses in one indictment, and a conviction on each, there can be but one punishment inflicted."

For other exceptions to *People v. Liscomb*, see, *infra*, § 1943.

Separate sentences on different counts charging distinct offenses, upheld in *United States v. Groesbeck*, 4 Utah 487, 11 Pac. 542. See *Burrell v. State*, 25 Neb. 581, 41 N. W. 399; *Walsh, In re*, 37 Neb. 454, 55 N. W. 1075.

Compare: *Crawford v. State*, 31 Tex. Cr. Rep. 51, 19 S. W. 766.

Sentence can not be imposed on a second or subsequent count where the maximum was imposed

on the first count.—*Taylor, In re*, 7 S. D. 382, 58 Am. St. Rep. 843, 45 L. R. A. 136, 64 N. W. 253.

Maximum penalty may be given for each distinct offense arising out of separate transactions.—*Hibbs, Ex parte*, 26 Fed. 421.

Successive sentences may be imposed where accused convicted on several counts.—*Peeke, Ex parte*, 114 Fed. 1016.

As to power to impose cumulative sentences, see note, 7 L. R. A. (N. S.) 125.

Where they do not exceed in the aggregate the penalty for a single offense.—*State v. Chandler*, 31 Kan. 201, 1 Pac. 787.

Even though they exceed in the aggregate the jurisdiction of the court.—*Donnelly, In re*, 30 Kan. 424, 1 Pac. 778.

⁷ *Infra*, § 1874. See *United States v. O'Callahan*, 6 McL. 598, Fed. Cas. No. 16219, and cases cited above.

In Illinois it is said that on a conviction on a series of counts, separate imprisonment may be imposed on each count, but the sentence is not to fix the day and hour on which each successive imprisonment is to begin. The sentence should specify the length of

§ 1851. — BUT NOT WHERE COUNTS ARE FOR NOT DISTINCT OFFENSES. What has just been said supposes that the counts describe separate offenses of each of which the jury convicted.¹ Otherwise, there can be properly no sentence except for the punishment proper for a single count, for it would be monstrous to say that the judge can impose on the defendant the aggregate penalties of two offenses when the offenses are virtually identical.² We may illustrate this by noticing the effect of a general verdict of guilty on an indictment containing a count for an assault, and a count for assault and battery, supposing the offenses to have been committed by the same act. The law imposes certain penalties for assault and battery, which penalties are designed to cover the assault as well as the battery. To sentence the defendant to the penalties for an assault, as averred in the first count, and then again for an assault and battery, as averred in the second count, would expose him to a double punishment for the same offense. The only legitimate course, when the several counts are simply successive stages of one offense, is, in accordance with the view already given, to impose the sentence on the count containing the highest offense, dropping the rest.³ This, to repeat once more a distinction

time on each count, and provide that the imprisonment on each count after the first shall begin with the imprisonment on the count before it terminated.—*Johnson v. People*, 83 Ill. 431. See *Peters, Ex parte*, 4 Dill. 169, Fed. Cas. No. 11027.

In *Polinsky v. People*, 73 N. Y. 65, 2 Cow. Cr. Rep. 469, affirming 11 Hun 390, it was held that where a defendant was convicted on an indictment in which he is charged with an offense punishable by fine, and also with one punishable by imprisonment, there is no legal ob-

jection to a sentence of fine and imprisonment.

¹ See *Hibbs, Ex parte*, 26 Fed. 421.

² See *Buck v. State*, 1 Ohio St. 61; *Nelson v. State*, 52 Wis. 534, 9 N. W. 388.

³ See cases cited supra, §§ 342, 1670, 1747, 1748. ALA.—*Cawley v. State*, 37 Ala. 152. CONN.—*State v. Merwin*, 34 Conn. 113; *State v. Tuller*, 34 Conn. 280. GA.—*Estes v. State*, 55 Ga. 131. ILL.—*Parker v. People*, 97 Ill. 32. IOWA.—*State v. Daugherty*, 70 Iowa 439, 30 N. W. 685. ME.—*State v. Hood*, 51 Me. 363. MD.—*Manley v. State*, 7 Md.

important to keep in mind in cases of this class, is on the supposition that the several counts are simply for separate stages or modifications of the same offense.

IV. DEFENDANT'S PRESENCE ESSENTIAL.

§ 1852. **IN GENERAL.** This point has been already discussed, and it has been shown that in all cases of corporal punishment the defendant's presence at the sentence is requisite.¹

V. AMENDMENT OR STAY.

§ 1853. **COURT MAY AMEND OR STAY DURING TERM.** As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session, provided a punishment already partly suffered be not increased.¹ It has even

149. MO.—State v. McCue, 39 Mo. 112; State v. Core, 70 Mo. 491. N. J.—Cook v. State, 24 N. J. L. (4 Zab.) 843. N. Y.—Conkey v. People, 1 Abb. Ct. App. Dec. 418, 2 Cow. Cr. Rep. 58, 5 Park. Cr. Rep. 31. N. C.—State v. Speight, 69 N. C. 72. S. C.—State v. Scott, 15 S. C. 434. VT.—State v. Hooker, 17 Vt. 658.

In Massachusetts this does not apply to distinct offenses.—See Charlton v. Com., 46 Mass. (5 Met.) 532; Booth v. Com., 46 Mass. (5 Met.) 535; Kite v. Com., 52 Mass. (11 Met.) 581.

In Michigan a sentence may be amended within a month.—See State v. Bemis, 51 Mich. 422, 16 N. W. 794.

¹ Supra, § 1486.

¹ CAL.—People v. Thompson, 4 Cal. 238; Monckros v. Von Vetsera, 7 Cal. App. 139, 93 Pac. 1037. D. C.—United States v. May, 2 McAr.

512. FLA.—Collins v. State, 13 Fla. 655. IND.—State v. Hess, 91 Ind. 424. IOWA.—State v. Daugherty, 70 Iowa 439, 30 N. W. 685. KAN.—State v. Hughes, 35 Kan. 626, 57 Am. Rep. 195, 12 Pac. 28; State ex rel. Minard v. Sowders, 42 Kan. 312, 22 Pac. 425; Black, In re, 52 Kan. 64, 39 Am. St. Rep. 331, 34 Pac. 414. LA.—State v. Brannon, 34 La. Ann. 495. MASS.—Com. v. Weymouth, 84 Mass. (2 Allen) 144, 79 Am. Dec. 776; Com. v. O'Brien, 175 Mass. 37, 55 N. E. 466. MICH.—Mason, In re, 8 Mich. 70. N. C.—State v. Warren, 92 N. C. 825. OHIO.—Lee v. State, 32 Ohio St. 113. PA.—Haxlett, In re, 1 Crumrine (Pitts.) 169; Com. v. Brown, 12 Phila. 600. TENN.—Greenfield v. State, 66 Tenn. (7 Baxt.) 18. UTAH.—People v. Reggel, 8 Utah 25, 28 Pac. 956. VA.—Price v. Com., 74 Va. (33 Gratt.) 819. FED.—Mechanics' Bank v.

been said that, during subsequent sessions, down to the period of the execution of the sentence, the court may further amend, or stay proceedings, or respite.² This prerogative, however, may properly be denied in all cases in which the term of sentence has in part expired, or in which the sentence has been in part executed;³ and the

Withers, 19 U. S. (6 Wheat.) 106, 5 L. Ed. 217; Casey, *Ex parte*, 18 Fed. 86. *ENG.*—*R. v. Fitzgerald*, 1 Salk. 401, 91 Eng. Repr. 347.

As to power to amend sentence, see notes 79 Am. Dec. 779, 39 Am. St. Rep. 335.

A judgment of conviction may be entered at a term subsequent to that of verdict.—See *State v. Miller*, 65 Tenn. (6 Baxt.) 513.

Court's power to amend or alter or modify sentence is ended by commitment or delivery of defendant to prison-keeper.—See *Sullivan*, *In re*, 3 Cal. App. 193, 84 Pac. 781; *Brown v. Rice*, 57 Me. 55, 2 Am. Rep. 11; *Com. v. Foster*, 122 Mass. 317, 23 Am. Rep. 236; *Jones*, *In re*, 35 Neb. 499, 53 N. W. 468; *State v. Cannon*, 11 Ore. 312, 2 Pac. 191; *Hartwell*, *In re*, 1 Lom. 536, Fed. Cas. No. 6173; *Fariday*, *Ex parte*, 43 Fed. 916.

Compare: *Basset v. United States*, 76 U. S. (9 Wall.) 39, 19 L. Ed. 548, in which case the court held that after a sentence to jail upon plea of guilty, and after the prisoner was committed and was serving out his sentence, the court might for good cause, at the same term, set the sentence aside.

See, also, *Jobe v. State*, 28 Ga. 235; *People v. Duffy*, 5 Barb. (N. Y.) 205; *Ammon v. Johnson*, 3 Ohio C. C. 272; *Cheang-kee v. United States*, 70 U. S. (3 Wall.) 320, 18 L. Ed. 72; *Graves*, *In re*, 117 Fed. Crim. Proc.—144

799; *Tiberg v. Warren*, 112 C. C. A. 596, 192 Fed. 463.

—Fine imposed and paid, court may not modify sentence to imprisonment.—*Parker v. State*, 51 Miss. 535.

After term ended power is gone.—*Nelson v. Mahan*, 83 C. C. A. 597, 12 L. R. A. (N. S.) 374, 155 Fed. 4.

24 Bl. Com. 394, 1 Chitty Cr. L. 617; *Com. v. Dowdican*, 115 Mass. 136; *State v. Addy*, 43 N. J. L. (14 Vr.) 113, 39 Am. Rep. 547; *State v. Cockerham*, 24 N. C. (2 Ired. L.) 204; *Morrisette v. People*, 20 How. Pr. (N. Y.) 118; *Allen v. State*, 8 Tenn. (Mart. & Y.) 297; *Fults v. State*, 32 Tenn. (2 Sneed) 232.

Compare: *McCarthy v. State*, 56 Miss. 295.

Court may suspend sentence, even in a capital case, was maintained, though against the protest of Governor De Witt Clinton, in *Miller's Case*, 9 Cow. (N. Y.) 730.

But an indefinite suspension of sentence can not be sustained, as it is an invasion of the prerogative of pardon.—*People v. Brown*, 54 Mich. 15, 19 N. W. 571; *People v. Kennedy*, 58 Mich. 372, 25 N. W. 318.

Sentence can not be suspended in part and executed in part.—*People v. Felker*, 61 Mich. 110, 27 N. W. 869.

³ *People v. Whitson*, 74 Ill. 20; *Brown v. Price*, 37 Me. 56; *Com. v.*

better opinion is that the mere entry of a rule to reconsider, at the term when the sentence was imposed, does not give the court the right, after execution of the sentence has substantially begun, to revise the sentence at future terms.⁴ And when cumulative penalties are given by a statute, and one of these, a fine, is imposed and satisfied, the sentence can not, after such satisfaction, be amended, even during the term of its imposition, by adding the other penalty.⁵ Nor, as we have seen, after a sentence on one count, can the court, at a subsequent term, sentence on another.⁶ Nor when a court suspends sentence, in a case of nuisance, on abatement and payment of costs, can it on a subsequent term impose sentence of imprisonment.⁷ But the court may temporarily suspend sentence in toto.⁸

Wyman, 84 Mass. (2 Allen) 144, 79 Am. Dec. 776; *People v. Duffy*, 5 Barb. (N. Y.) 205; *State v. Cannon*, 11 Ore. 312, 2 Pac. 191.

Compare: *Johnston v. Com.*, 85 Pa. St. 54, 27 Am. Rep. 622; *Com. v. Brown*, 12 Phila. (Pa.) 600; *Casey*, Ex parte, 18 Fed. 86.

⁴ *Com. v. Malloy*, 57 Pa. St. 291.

⁵ *Scott v. Davis*, 31 La. Ann. 249; *Lange*, Ex parte, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872. As to process in this case, see, *infra*, § 1943.

⁶ *State v. Davis*, 31 La. Ann. 249; *Com. v. Foster*, 122 Mass. 317, 23 Am. Rep. 326, cited *supra*, § 1849; *United States v. Malone*, 9 Fed. 897.

⁷ *State v. Addy*, 43 N. J. L. (14 Vr.) 113, 39 Am. Rep. 547; *Whitney v. State*, 74 Tenn. (6 Lea) 247.

⁸ *Ibid.* FLA.—Ex parte *Williams*, 26 Fla. 310, 8 So. 425. ME.—In *re St. Hilaire*, 101 Me. 522, 8 Ann. Cas. 385, 64 Atl. 382. MASS.—*Com. v. Dowdican*, 115 Mass. 133.

N. Y.—*People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 23 L. R. A. 856, 36 N. E. 386; *Typothetæ v. Typographical Union No. 6*, 66 Misc. 484, 123 N. Y. Supp. 967 (staying issuance of process for imprisonment of officers of labor union for contempt of court). TENN.—*Allen v. State*, 8 Tenn. (Mart. & Y.) 294. UTAH—*People v. Blackburn*, 6 Utah 347, 23 Pac. 759.

Compare: *People v. Morrisette*, 20 How. Pr. (N. Y.) 118.

As to power of court to suspend criminal sentence, see note 95 Am. St. Rep. 241.

As to suspension of criminal sentences, see note 46 Am. St. Rep. 848.

Indefinite suspension of sentence in a case beyond the power of the courts.—*People ex rel. Boenert v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230, 63 L. R. A. 82, 67 N. E. 23. See *Neal v. State*, 104 Ga. 509, 69 Am. St. Rep. 175, 42 L. R. A.

VI. CAPITAL PUNISHMENT.

§ 1854. ON VERDICT OF GUILTY ON INDICTMENT FOR MURDER, COURT WILL SENTENCE FOR SECOND DEGREE. When the indictment is so drawn as to sustain a verdict of either murder in the first or murder in the second degree, and there is a general verdict of guilty, it has been held error to sentence for murder in the first degree; and a court of error may reverse on this ground, and impose a sentence of murder in the second degree.¹ In Wisconsin, under such circumstances, a new trial is granted.² But in most jurisdictions, by statute, if not at common law, the verdict must specify the degree.³

§ 1855. DEFENDANT TO BE ASKED AS TO SENTENCE, AND MAY REPLY. Before imposing sentence of death, it is eminently the duty of the court patiently and considerately to hear whatever final remarks may be made by the prisoner in reference to his guilt. Nor is it possible, on such conspicuous occasions, for a humane and conscientious judge to avoid preceding the sentence by such observations as may tend to give a public moral force to this last and most terrible judgment of the law. Whether he shall

190, 30 S. E. 858 (sentence six months at hard labor, qualified by "sentence of six months suspended until further order of this court").

As to indefinite suspension of criminal sentence, see note 69 Am. St. Rep. 184.

Mitigating circumstances grounds for suspending sentence.—Ex parte Williams, 26 Fla. 310, 8 So. 425.

Pendency of another indictment ground for suspending sentence.—Ex parte Williams, 26 Fla. 310, 8 So. 425.

Temporary suspension of sentence in a criminal case on a plea of guilty is permissible.—In re St. Hilaire, 101 Me. 522, 8 Ann. Cas. 385, 64 Atl. 882.

¹ State v. McCormick, 27 Iowa 402; Johnson v. Com., 24 Pa. St. 386.

In New York such a verdict has been held to be for the first degree.—Kennedy v. People, 39 N. Y. 245. See fully 1 Kerr's Whart. Crim. Law, § 676.

² Hogan v. State, 30 Wis. 437.

³ 1 Kerr's Whart. Crim. Law, § 676.

A person may be tried for the crime of murder, notwithstanding he is at the time serving a sentence of life imprisonment for another offense.—People v. Majors, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597.

say anything at this time, however, and what he shall say, is wholly at the discretion of the judge. The question put to the prisoner has been already specifically discussed.¹

§ 1856. SENTENCE DEPENDS ON STATUTE. The form of sentence depends mainly on the local statutory law. By the English common law, as followed in several of our states, it is not the function of the court to fix the time and place of execution in the original sentence.¹ This in some jurisdictions is done by the chief magistrate of the state, in signing the warrant;² in some by the court, on subsequent motion. And if the time designated for execution elapses without such execution, by stay of execution or otherwise, a new time for execution is to be assigned, the judgment still remaining in force.³ The mode of punishment is hereafter noticed.⁴

¹ Supra, § 1845.

¹ ALA.—Gray v. State, 55 Ala. 81. CAL.—People v. Murphy, 45 Cal. 137. N. Y.—Weed v. People, 31 N. Y. 465. FED.—Waterman, Ex parte, 33 Fed. 29. ENG.—R. v. Doyle, 4 Leach 67; R. v. Wyatt, 1 R. & R. 230.

A certified copy of record of sentence is sufficient to authorize detention of a prisoner without warrant.—Wilson, Ex parte, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89.

² 2 Hale P. C. 399. MASS.—Webster v. Com., 59 Mass. (5 Cush.) 386. N. H.—Howard, Ex parte, 17 N. H. 545. N. Y.—Lowenberg v. People, 27 N. Y. 336, 26 How. Pr. 202. PA.—Cathcart v. Com., 37 Pa. St. 108.

In Alabama, sentence specifies the day.—Aaron v. State, 40 Ala. 308.

Fixing day of execution in judgment is not the best practice, but is not erroneous.—See People v.

Murphy, 45 Cal. 137. See State v. Shawen, 40 W. Va. 12.

³ State v. Oscar, 13 La. Ann. 297; Howard, Ex parte, 17 N. H. 545; Lowenberg v. People, 27 N. Y. 336; R. v. Harris, 1 Ld. Raym. 482, 91 Eng. Repr. 1221.

Compare: Bland v. State, 2 Ind. 608.

In case of escape, the court may direct the sentence to be carried out when the defendant is caught.—State v. Cardwell, 95 N. C. 643. Infra, § 1870.

Defendant can not waive the right to an interval fixed by statute between sentence and execution. See Koerner v. State, 96 Ind. 243.

Sentence of death pronounced upon a conviction of murder, before determining a motion for a new trial filed prior to sentence, is not error in trial court.—State v. Hoyt, 46 Conn. 330.

⁴ Infra, §§ 1758 et seq.

§ 1857. **PREGNANCY IS GROUND OF RESPITE.** In the frequency of capital punishments in the old English practice, it was not uncommon for female prisoners to claim the benefit of the law that no woman should be executed while she was quick with child. The practice, under such circumstances, is for the woman when called prior to sentence to say whether she has anything to allege why sentence of death should not be passed upon her, to plead orally her pregnancy, upon which the sheriff is forthwith directed to impanel a jury of matrons. This jury being sworn to inquire as to whether the prisoner is "quick with child," they retire with the prisoner; and the court is governed by their verdict to the same extent that it would be by the verdict of a jury impaneled to try any issue of fact. In the hearing before the jury, surgeons may be called to testify as experts.¹ If the verdict be found in the defendant's favor, she is respited from session to session until the delivery of the child.² In New

¹ In *R. v. Webster*, London, 1879, an application of this character was made to Denman, J., sitting at the Old Bailey. The law, as stated by the judge, was that the woman must be "quick with child." A jury was impaneled from women in the gallery of the court-room. The judge, in summing up, said: "This is a very unusual inquiry, ladies of the jury, and it has never happened to me before. The law is that, if it be established to the satisfaction of the jury that the prisoner is quick with child, then the execution must be respited. If you feel that it would be desirable, before deciding that issue, that you should retire into the jury-room, you are warranted in doing so—and I should desire you to do it. At the same time, as women who are married, I feel sure that you will be of

opinion that the judgment of a person who has for years practiced as an accoucheur, who appears to be a fair-minded, clear-minded, and skilful man in medical matters, is entitled to be taken—not that the prisoner is in a condition of pregnancy, but whether she is or is not quick with child."

The jury occupied two or three minutes in deliberation in the box.

Mr. Ivory: Have you agreed upon your verdict?

The Forewoman: Yes.

Mr. Ivory: Do you find that the prisoner is with child—quick child—or not?

The Forewoman: Not.

Mr. Ivory: You say she is not.

The prisoner was then removed from the dock.

² See 4 Black. Com. 295 (though Blackstone maintains that a sec-

York this right is prescribed by statute.³ But when no statute exists, it without question obtains at common law.⁴

VII. CORPORAL PUNISHMENT.

§ 1858. LIMITS OF SENTENCE TO BE DETERMINED BY STATUTE—DISCRETION ALLOWED TO COURTS. The moulding of sentences of imprisonment is in the discretion of the court, provided the statutory bounds be not exceeded.¹ Even a statute providing that sentence shall be pronounced within a certain time after judgment is directory, though delay in this respect is not to operate to the prejudice of the prisoner.² The power of amendment of sentence reserved to the court has been already discussed.³ The court can not go beyond the limits, as to mode of punishment, imposed by the legislature.⁴

The place of imprisonment need not at common law be designated in the sentence.⁵

Under the federal code, as at common law, the designation of a place of imprisonment is no part of the sentence.⁶

The revision in error of sentences of imprisonment has also been already noticed.⁷ Judgment, it has been held, will not be reversed for a sentence of imprisonment less than that permitted by law, if the statutory character of

and pregnancy can not be consecutively pleaded to the same sentence, to which Christian demurs); 1 Hale P. C. 369, 370; 1 Chitty Cr. L. 759.

A form will be found in R. v. Wycherley, 8 Car. & P. 262, 34 Eng. C. L. 723.

³ 2 R. S. 658, § 20.

⁴ State v. Arden, 1 Bay L. (S. C.) 487.

In Holeman v. State, 13 Ark. (8 Eng.) 105, which was a case of larceny, the plea was overruled.

¹ Supra, § 1853; McCulley v. State, 62 Ind. 428.

² John v. State, 2 Ala. 290; R. v.

Wyatt, 1 R. & R. 230; see, infra, § 1864.

³ Supra, § 1853.

⁴ Ryan, In re, 45 Mich. 173; State v. Norwood, 93 N. C. 578; Daniels v. Com., 7 Pa. St. 339; Karstendick v. United States, 93 U. S. 396, 23 L. Ed. 889 (which last two cases conflict, though with the better reason in the former case); Hodge v. R., 5 Crim. Law Mag. 391, and note thereto.

⁵ Infra, § 1868; supra, § 1856.

⁶ Waterman, Ex parte, 33 Fed. 29. Supra, § 1856.

⁷ Supra, §§ 1683, 1704, 1845; infra, § 1869.

the punishment be not changed;⁸ and this has been sustained in a case where, in a statute allowing fine and imprisonment, only one of the two is imposed.⁹ But it is hard to see, if there are reasons why the punishment which is nominally less may be actually greater, as where under such punishment, the prisoner is discharged at an inclement season, or without bounties given at a particular time, why in such case he should not be permitted to take advantage of the error.¹⁰

It is agreed that where a sentence is divisible, the defective part may be stricken out in review.¹¹ But, although a cumulative penalty, affixed to a sentence, may, when illegal, be stricken off as surplusage by a court of error, it is otherwise when such penalty is a qualification of the whole sentence. In such case there must be a reversal.¹²

The punishments,—e. g., fine and imprisonment,—may

⁸ *Infra*, § 1869. ALA.—*Ooton v. State*, 5 Ala. 463; *Campbell v. State*, 16 Ala. 144. ILL.—*McQuoid v. People*, 8 Ill. (3 Gilm.) 76. IND.—*Behler v. State*, 22 Ind. 345. KY.—*Com. v. Shanks*, 49 Ky. (10 B. Mon.) 304. LA.—*State v. Evans*, 23 La. Ann. 525. MD.—*Rawlins v. State*, 2 Md. 201. MO.—*Barada v. State*, 13 Mo. 94. N. Y.—*People v. Bauer*, 37 Hun 407, 3 N. Y. Cr. Rep. 433. OHIO.—*Dillon v. State*, 30 Ohio St. 586. TENN.—*Wattingham v. State*, 37 Tenn. (5 Sneed) 64. WIS.—*Haney v. State*, 5 Wis. 529.

Supra, §§ 1716, 1846.

Compare: *Brown v. State*, 47 Ala. 53; *Taff v. State*, 39 Conn. 82; *Rice v. Com.*, 53 Mass. (12 Metc.) 246.

⁹ *Dodge v. State*, 24 N. J. L. (4 Zab.) 455; *Dillon v. State*, 38 Ohio St. 587, 43 Am. Rep. 442.

Compare: *United States v. Vickery*, Har. & J. (Md.) 427, Fed. Cas. No. 16619.

¹⁰ See *Bourne v. R.*, 7 Ad. & E. 58, 34 Eng. C. L. 55, 7 Nev. & P. 248; *Whitehead v. R.*, 7 Ad. & E. N. S. (7 Q. B.) 583; 1 Cox 199.

¹¹ *Supra*, § 1716, and cases there cited. ALA.—*David v. State*, 40 Ala. 69. CAL.—*Baldwin*, Ex parte, 60 Cal. 432. CONN.—*Taff v. Com.*, 39 Conn. 82. ILL.—*McQuoid v. People*, 8 Ill. (3 Gilm.) 76. IND.—*Kennedy v. State*, 62 Ind. 136. IOWA.—*Murphy v. McMillan*, 59 Iowa 515, 13 N. W. 654. LA.—*State v. Brannan*, 34 La. Ann. 942; *State v. Evans*, 23 La. Ann. 525. MASS.—*Chuston v. Com.*, 46 Mass. (5 Metc.) 530. N. J.—*Dodge v. State*, 24 N. J. L. (4 Zab.) 455. N. Y.—*Kane v. People*, 8 Wend. 205; *People v. Phillips*, 42 N. Y. 200, 1 Cow. Cr. Rep. 196. PA.—*Beck v. Com.*, 25 Pa. St. 11; *Weaver v. Com.*, 29 Pa. St. 445. TENN.—*State v. Ragsdale*, 78 Tenn. (10 Lea) 671, cited, *supra*, § 1722.

¹² *Bradley v. State*, 69 Ala. 318; *Kanouse v. Lexington*, 12 Ill. App.

be cumulatively imposed when the statute permits;¹³ but where a statute prescribes alternative penalties, one only can be inflicted.¹⁴

The practice when the jury graduate the imprisonment in their verdict has been treated in a prior chapter.¹⁵

It is within the discretion of the court, on application, to hear affidavits in aggravation or mitigation of sentence.¹⁶

Restitution of goods can not be awarded unless the indictment avers a taking.¹⁷

§ 1859. FINE AND IMPRISONMENT ARE THE USUAL COMMON-LAW PENALTIES. By the common law, as now modified in American practice, fine and imprisonment, in cases not capital, are the usual punishments;¹ and when a statute creates an offense without assigning a penalty, fine and imprisonment are the penalties to be imposed.² At one time it was maintained by a Pennsylvania judge, zealous of common law traditions, that on common scolds ducking could be inflicted, but this view was rejected by the Supreme Court, and now no longer is countenanced.³ "Whipping" will be presently considered. A sentence of forfeiture of the weapon used has been held in Texas to be unconstitutional.⁴

318; *State v. Brannan*, 34 La. Ann. 942.

¹³ *Polinsky v. People*, 73 N. Y. 65, 2 Cow. Cr. Rep. 469, affirming 11 Hun 390.

¹⁴ *Dodge v. State*, 24 N. J. L. (4 Zab.) 455; *State v. Kearney*, 8 N. C. (1 Hawks L.) 53; *Dillon v. State*, 38 Ohio St. 589. See, *infra*, § 1865.

¹⁵ *Supra*, § 1685.

¹⁶ *Infra*, § 1890.

¹⁷ *Huntzinger v. Com.*, 97 Pa. St. 336.

¹ *Conner v. Com.*, 76 Ky. (13 Bush) 718; *State v. Dewar*, 65 N. C. 572.

² See *State v. Danforth*, 3 Conn. 112; *Respublica v. De Longchamps*, 1 U. S. (1 Dall.) 111, 1 L. Ed. 59; *United States v. Coolidge*, 1 Gall. 488, Fed. Cas. No. 14857.

Party sentenced to a fine, the court is at liberty to imprison him until the fine is paid.—*Jackson, Ex parte*, 96 U. S. 727, 24 L. Ed. 877. *Infra*, § 1865.

³ *James v. Com.*, 12 Serg. & R. (Pa.) 220; *United States v. Royall*, 3 Cr. 620, Fed. Cas. No. 16202.

⁴ *Leatherwood v. State*, 6 Tex. App. 244.

§ 1860. "CRUEL AND UNUSUAL PUNISHMENT" IS UNLAWFUL. The constitutional provision in this respect has been held not to apply to state courts.¹ Its principle, however, must be considered as part of the common law of each state, and is incorporated in most state constitutions.² But in 1879, an ordinance in San Francisco, providing for the cutting off of the queues of Chinese as a mode of special punishment, was held by Field, J., of the Supreme Court of the United States, to conflict with the federal Constitution, on the ground that hostile and discriminating legislation by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment of the Constitution.³ But this ruling does not touch the question of general legislation or prison regulation requiring all convicts to be shaved. Such legislation or regulation is undoubtedly constitutional.⁴

§ 1861. "WHIPPING" NOT CRUEL AND UNUSUAL. What are "cruel and unusual?" Certainly not solitary imprisonment at hard labor, when not flagrantly excessive, though, when introduced, such penalties were unusual, and by eminent philanthropists were held to be cruel.¹ Nor can

¹ *Barker v. People*, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; *James v. Com.*, 12 Serg. & R. (Pa.) 220; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.

² *Barker v. People*, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; *James v. Com.*, 12 Serg. & R. (Pa.) 220; *Pervear v. Com.*, 72 U. S. (5 Wall.) 475, 18 L. Ed. 608.

Working in the public streets in payment of a fine is not cruel or unusual.—*Bedell*, Ex parte, 20 Mo. App. 125.

³ *Ho Ah Kow v. Nunan*, 5 Sawy. 552, 20 Alb. L. J. 250, Fed. Cas. No. 6546.

In China, however, if we can trust Jules Verne's Chinaman in China, the cutting away of queues is a customary punishment.

⁴ See notice of New Jersey ruling to this effect in *San Francisco Call*, Aug. 16, 1883, 4 Crim. Law Mag. 742.

¹ *Whitten v. State*, 47 Ga. 497; *State v. Williams*, 77 Mo. 310; see *State v. Pettie*, 80 N. C. 367, 30 Am. Rep. 88.

Question of duration of punishment is usually at the discretion of the court. *Infra*, § 1888; also, *Hester v. State*, 17 Ga. 132; *State v. Driver*, 78 N. C. 423.

Twenty years for arson is not

whipping be so pronounced.² It has been found to be the most efficacious of penalties in checking certain classes of brutal crimes;³ it may be far less cruel than certain durations and kinds of imprisonment; and so far from being "unusual" at the time the term was used in the constitution, it was then in general use as a penal discipline. It can not be rejected, therefore, as conflicting with the principle embodied in the constitutional sanction above given; though in some jurisdictions it may be forbidden by statute.⁴

Shooting, as a method of death, may be inflicted under the Utah statute.⁵

Electrocution, as a method of executing a sentence of death, is not cruel and unusual punishment, and acts providing for such method of execution have been held to be constitutional.⁶

VIII. FINES AND ABATEMENT.

§ 1862. FINES MAY BE COLLECTED BY EXECUTION. By a statute of the United States, a fine or penalty imposed

excessive. See *Davis v. State*, 15 Tex. App. 594.

² MD.—*Foot v. State*, 59 Md. 264. N. M.—*Garcia v. Territory*, 1 N. M. 415. N. C.—*Com. v. Wyatt*, 27 Va. (6 Rand.) 694. FED.—*State v. Kearney*, 8 N. C. (1 Hawks L.) 54. VA.—*United States v. Collins*, 2 Curt. 194, Fed. Cas. No. 14836.

Compare: 2 Kerr's Whart. Crim. Law, § 1107; 27 Cent. L. J. 157.

As to cruel and unusual punishment, see note, 35 L. R. A. 562.

As to flogging as a punishment, see Lord Macaulay's Report on Indian Code. See, also, 15 Am. Law Rev. 127.

In *State v. Williams*, 77 Mo. 310, the court cited with approval the following from the opinion of the court in *James v. Com.*, 12 S. & R. (Pa.) 220: "It must be a very

glaring and extreme case to justify the court in pronouncing a punishment unconstitutional on account of its cruelty."

³ See 1 Wh. & St. Med. Jur., §§ 170, 539, note s, and notes given, infra. See, also, to same effect, 1 Steph. Hist. Cr. Law 91, article in London Law Times, July 1, 1882.

⁴ By act of Congress it is forbidden in military and naval discipline. See R. Stat. U. S., § 5327, 2 Fed. Stats. Ann., 1st ed., p. 354, 7 Fed. Stats. Ann., 2d ed., 973.

⁵ *Wilkerson v. Utah*, 99 U. S. 130, 25 L. Ed. 345; sub nom. *Wilkerson v. United States*, 2 Utah 158.

⁶ In *re Storti*, 178 Mass. 549, 52 L. R. A. 520, 60 N. E. 210; *People v. Durston*, 119 N. Y. 569, 7 N. Y. Cr. Rep. 457, 24 N. E. 6.

as "a judgment or sentence" against any person in criminal cases "shall be declared a judgment debt, and (unless pardoned or remitted by the President) may be collected on execution in the common form of law."¹ In several of the states similar statutes are in force, and it has also been held that the same practice exists at common law.² Process of this kind is supplementary to that specified by the sentence, of imprisonment until the fine be paid. For, by the sentence, the defendant stands committed until the fine and costs shall be paid;³ and this commitment is technically, when the sentence is simply a fine, to the sheriff, though in practice, and under statute, it usually is to the keeper of the county prison.⁴ When the imprisonment is simply auxiliary to the collection of the fine, it is not such an imprisonment as to fall within the constitutional guarantees respecting imprisonment for crimes.⁵ But when the statute prescribes fine or imprisonment the two can not be cumulatively attached, though imprisonment may be imposed until the payment of the fine.⁶

Joint fines are hereafter discussed.⁷

§ 1863. ABATEMENT A FORM OF EXECUTION. Abatement, as a form of execution, is considered in another volume.¹

IX. FORM OF SENTENCE.

§ 1864. MUST BE DEFINITE. The sentence must be definite, exact, and peremptory.¹ Hence it has been held error

¹ Act of Feb. 20, 1863; Rev. Stat. U. S., § 1041, 3 Fed. Stats. Ann., 1st ed., p. 98, 3 Fed. Stats. Ann., 2d ed., p. 327.

² Tongate, Ex parte, 31 Ind. 370; see *Strafford v. Jackson*, 14 N. H. 16; *Kane v. People*, 8 Wend. (N. Y.) 203; *Beasley v. State*, 10 Tenn. (2 Yerg.) 481.

³ *Infra*, § 1865; *Harris v. Com.*, 39 Mass. (23 Pick.) 280; *R. v. Layton*, 1 Salk. 353.

⁴ *Harris v. Com.*, 40 Mass. (23 Pick.) 280; *Kane v. People*, 8 Wend. (N. Y.) 203; *Hill v. State*, 10 Tenn. (2 Yerg.) 247; *R. v. Bethel*, 5 Mod. 20, 87 Eng. Repr. 494; *R. v. Layton*, 1 Salk. 353.

⁵ *Bollig, Ex parte*, 31 Ill. 88.

⁶ *Supra*, § 1858. *Infra*, § 1865.

⁷ *Infra*, § 1885.

¹² *Kerr's Whart. Crim. Law*, § 1692.

¹ *Bradley v. State*, 69 Ala. 318;

for the sentence to recite that the court is "of opinion" that the defendant should pay a fine, etc., the true form being, "it is considered" that he shall,² etc.; and also to incorporate a condition of remission,³ and also when instead of a definite an indefinite termination is assigned.⁴ Nor can indefiniteness be cured by an appeal to other records.⁵ But, as has been seen, it is not necessary in the sentence to fix the time and place of execution.⁶ Nor will there be a reversal for a merely formal error in the record of sentence.⁷

§ 1865. HOW FAR ALTERNATIVE SENTENCE PERMITTED.

Where a statute prescribes a punishment in default of payment of a fine, the practice is to sentence to imprisonment until the fine be paid; and at common law imprisonment may be imposed until payment of fine.¹ But a sentence prescribing alternative penalties is defective;² nor can alternative punishments be cumulatively attached.³ And two distinct punishments can not at different times be inflicted on one verdict.⁴ Thus, when the defendant

United States v. Patterson, 29 Fed. 775.

² Knowles v. State, 2 Root (Conn.) 282; State v. Lake, 34 La. Ann. 1069.

³ State v. Bennett, 15 N. C. (4 Dev. & B. L.) 44.

⁴ Le Roy v. Rainer, 1 Sid. 214, 82 Eng. Repr. 1064.

⁵ State v. Huber, 8 Kan. 447; Picket v. State, 22 Ohio St. 405.

⁶ Supra, § 1856.

⁷ People v. Murback, 64 Cal. 369, 30 Pac. 608.

¹ Supra, § 1657. ALA.—Morgan v. State, 47 Ala. 34. MASS.—Harris v. Com., 40 Mass. (23 Pick.) 280. MICH.—Brownbridge v. People, 38 Mich. 751. NEB.—Johnson, Ex parte, 15 Neb. 512, 19 N. W.

594. N. H.—State v. Shattuck, 45 N. H. 205. FED.—Jackson, Ex parte, 96 U. S. 727, 24 L. Ed. 877.

Contra, apparently, State v. Perkins, 82 N. C. 681.

² State v. Perkins, 82 N. C. 681.

As to what is alternative, see Potsdamer v. State, 17 Fla. 895; Brownbridge v. People, 38 Mich. 751.

³ Montgomery, Ex parte, 79 Ala. 275; State v. Davis, 31 La. Ann. 249; State v. Kearney, 8 N. C. (1 Hawks L.) 53; State v. Walters, 97 N. C. 489, 2 Am. St. Rep. 310, 2 S. E. 539; Hannahan v. State, 7 Tex. App. 664; Piper v. Com., 55 Va. (14 Gratt.) 710.

See 3 Kerr's Whart. Crim. Law, §§ 2228-2230.

⁴ Supra, § 1853.

under one verdict is twice sentenced by the court to two punishments, to be inflicted at different places and of different duration, the last sentence is void.⁵

§ 1866. DAY OF SENTENCE IS FIRST DAY OF IMPRISONMENT. The day of sentence is reckoned as the first day of imprisonment, supposing the defendant to be put actually in custody on that day.¹ It is enough to specify that the imprisonment shall continue "for the term of three years" from the date of incarceration or imprisonment.² Until, however, the imprisonment commences, the sentence does not begin to run.³

§ 1867. EXPIRATION WITHOUT ENDURANCE IS NOT EXECUTION. Expiration of the time of a sentence without actual imprisonment is not a satisfaction of the sentence. Hence a prisoner who is recaptured after an escape must serve an imprisonment equal in length to that to which he was sentenced, not deducting the time when he was at large.¹

⁵ *State v. Davis*, 31 La. Ann. 249.

¹ *Jackson, In re*, 3 MacA. (D. C.) 24; *Myers, Ex parte*, 44 Mo. 279; *People ex rel. Stokes v. Warden*, 66 N. Y. 343, 2 Cow. Cr. Rep. 264; *People v. McEwen*, 62 How. Pr. (N. Y.) 226, 412; *Duckett, Ex parte*, 15 S. C. 210, 40 Am. Rep. 694.

As to statutory power to jury to impose alternative penalties, see *Herron v. Com.*, 79 Ky. 38.

² *People v. Hughes*, 29 Cal. 257; *Hollon v. Hopkins*, 21 Kan. 638; *State v. Smith*, 10 Nev. 107.

In *Migetti v. Colville*, 14 Cox C. C. 263, L. R. 4 C. P. Div. 233, a sentence of one calendar month's imprisonment is held to expire on the day preceding that day which corresponds numerically in the

next succeeding month with the day on which the sentence was passed. If there is no such corresponding day in the next month, then the sentence expires on the last day of that month. Hence, where the plaintiff was sentenced by a magistrate to be imprisoned for one calendar month, and was taken into custody during the afternoon of the 31st of October, it was held that the sentence did not expire till midnight on the 30th November.

³ *Infra*, §§ 1867, 1875.

¹ *Clifford, Ex parte*, 29 Ind. 106; *Hollon v. Hopkins*, 21 Kan. 638; *Dolan's Case*, 101 Mass. 219; *Bell, Ex parte*, 56 Miss. 282; *Edwards, In re*, 43 N. J. L. (14 Vr.) 555, 39 Am. Rep. 610; see, *infra*, § 1875.

§ 1868. PRISON NEED NOT, AT COMMON LAW, BE SPECIFIED. It is not error to omit to specify in a sentence the prison in which the prisoner is to be confined,¹ nor to use "penitentiary" as convertible with "prison."²

The form in capital cases is given in a preceding section.³

X. SENTENCE BY APPELLATE COURT.

§ 1869. BY STATUTE, APPELLATE COURT MAY SENTENCE, OR MAY REVERSE FOR ERROR. It has already been observed that at common law an appellate court, on reversing a judgment for error in the sentence, is held in England and in some parts of the United States to be incapable of re-imposing sentence, and to be obliged to discharge the prisoner.¹ This proposition, however, is not universally accepted, and now, under statutes, if not at common law,

¹ Weed v. People, 31 N. Y. 465. See Atkinson v. R., 3 Bro. P. C. 517, and cases cited, supra, §§ 1856, 1858.

² Millar v. State, 2 Kan. 174. But see Wilson v. People, 24 Mich. 410; infra, § 1869.

Where case has been removed for revision, the sentence must be executed by the sheriff of the county in which the trial was had.—State v. Twiggs, 60 N. C. (1 Wins.) 142.

³ See, supra, § 1854.

¹ Supra, §§ 1716, 1854.

Doctrine originated in England at a time when the courts of that country held that they had no authority to revise proceedings and judgments and grant new trials in cases of felony, and partakes of the reasoning of that period, when a judgment in a criminal case was recorded as absolute, unless the defendant was pardoned.—See Dodge v. People, 4 Neb. 220.

Common-law doctrine has been overruled and English courts now hold that they have full authority in such cases to impose the sentence required by law.—See R. v. Kenworthy, 1 Barn. & C. 711, 8 Eng. C. L. 300; R. v. Holloway, 15 Jur. 825, 5 Eng. L. & Eq. 310.

"The common law embodies in itself sufficient reason and common sense to reject the doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether, because the court committed error in passing sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established. One duty is to correct errors and 'minister justice,' but such a course would perpetuate error, and produce the most intolerable injustice.—Beale v. Com., 25 Pa. St. 22.

As to habeas corpus in such cases, see infra, § 1939.

the practice is for the appellate court to correct and review sentences even in capital cases,² or the court may remit the record to the court of trial, with directions to impose the proper sentence.³ Nor is it necessary that the judges imposing the sentence should be the judges who tried the case, though all are members of the same court.⁴ Yet in jurisdictions where no common law right in this respect is recognized, the statutes are to be construed as giving only that authority which they nakedly convey. Thus in Michigan a statute exists which requires, when an excessive punishment is given by the court below, that the judgment shall only be reversed for the excess. This statute has been ruled not to apply to a sentence to the "state prison," for an offense only punishable in the county jail. In this case, it has been held, judgment must be reversed in toto and the prisoner discharged.⁵ And ordinarily a sentence exceeding that allowable on the good counts of an indictment will be reversed,⁶ or modified if such be the local practice.⁷

For a sentence less than that permitted by law, it has been held, there will be no reversal.⁸

² ALA.—Finley v. State, 61 Ala. 201. IOWA—State v. Thompson, 46 Iowa 699. MISS.—Kelly v. State, 11 Miss. (3 Smed. & M.) 518. N. Y.—People v. Phillips, 42 N. Y. 200, 1 Cow. Cr. Rep. 196. OHIO—Montgomery v. State, 7 Ohio St. 107. PA.—Daniels v. Com., 7 Pa. St. 371; Mills v. Com., 13 Pa. St. 631; White v. Com., 3 Brewst. 30; Drew v. Com., 1 Whart. 279. TENN.—Kelly v. State, 66 Tenn. (7 Baxt.) 323.

See, also, cases cited, supra, § 1716.

³ Moett v. People, 85 N. Y. 353; State v. Lawrence, 81 N. C. 521; State v. Thorne, 81 N. C. 555; Beale v. Com., 25 Pa. St. 11; infra, § 1870.

⁴ Moett v. People, 85 N. Y. 67. See State v. Shea, 95 Mo. 85, 8 S. W. 409; supra, § 1829.

⁵ Wilson v. People, 24 Mich. 410. Compare: Millar v. State, 2 Kan. 174.

⁶ Brown v. State, 47 Ala. 47; State v. Bean, 21 Mo. 269.

In People v. Parkhurst, 50 Mich. 389, 15 N. W. 522, it was held that the reversal was to be as to the excess, but that if the legal extent of the punishment had been reached the prisoner was to be discharged.

⁷ Com. v. Kirby, 56 Mass. (2 Cush.) 577; Com. v. Kennedy, 131 Mass. 584; Johnston v. Com., 85 Pa. 54, 27 Am. Rep. 622.

⁸ Supra, § 1858.

The affirming of a conviction leaves the conviction in its original force.⁹

§ 1870. IN CAPITAL AND OTHER CASES RECORD REMANDED TO COURT BELOW FOR EXECUTION. A repetition by an appellate court of sentence of death on a prisoner, while the judgment of the court on which he is tried is still valid, is an informality which does not vitiate the proceedings.¹ But it seems that the usual course in a capital case is for the appellate court to remit the record, after revising the same, for proper sentence to the court where the conviction was had.² And certainly an appellate court will not modify the sentence of the court below, except for matters merely technical, when the record does not show the circumstances attending the commission of the offense.³

The practice of appellate courts, when the sentence of the court below has varied from the statutory limits of imprisonment, has been already discussed.⁴

As to habeas corpus, see, *infra*, § 1939.

⁹ *Hanrahan v. People*, 95 Ill. 165.

¹ *Ferris, In re*, 35 N. Y. 262, 32 How. Pr. 411.

² DAK.—*Territory v. Conrad*, 1 Dak. 363, 46 N. W. 605. MICH.—*Elliott v. People*, 13 Mich. 365. MISS.—*Benedict v. State*, 12 Miss. (4 Smed. & M.) 313. NEB.—*Dodge v. People*, 4 Neb. 220. N. Y.—*McKee v. People*, 32 N. Y. 239. OHIO—*Williams v. State*, 18 Ohio St. 46; *Picket v. State*, 22 Ohio St. 405. PA.—*Beale v. Com.*, 25 Pa. St. 22; *McCue v. Com.*, 78 Pa. St. 185, 21 Am. Rep. 7.

See, also, cases cited, *supra*, §§ 1716, 1869.

³ *State v. Patton*, 19 Iowa 458.

⁴ *Supra*, §§ 1716, 1858.

After conviction in New York in 1869, on error to the general term,

the judgment of conviction was reversed and the defendant discharged, on error to the Court of Appeals it was held that the conviction was properly reversed; but as a small portion only of the defendant's term of sentence had expired, and it did not appear that a conviction would not be had upon a new trial, it was error to discharge absolutely; and a new trial was ordered (*Foster, J.*, 1870).—*People v. Phillips*, 42 N. Y. 200, 1 Cow. Cr. Rep. 196. See, *supra*, § 1706.

In the same state it was held in 1873 that when there is a reversal for error in sentence, the prisoner will not be discharged, but the Supreme Court will examine the record of the errors alleged to have been committed on trial, and will grant a new trial if any of

XI. SENTENCE BY SUCCEEDING JUDGE.

§ 1871. SUCH SENTENCE MAY BE REGULAR. It has been ruled in Wisconsin that a judge of the Circuit Court may pronounce sentence on a prisoner convicted before his predecessor in office.¹ It was held, however, in Philadelphia, by the United States Circuit Court, that this does not hold when the judge trying the case dies pending a motion for a new trial; but that under such circumstances a new trial will be granted.² But it is clear that a circuit court of the United States, though held by only one of the two judges that tried the case, may pass sentence.³

XII. SUCCESSIVE IMPRISONMENTS.

§ 1872. IN GENERAL. By statutes in England and in most of the United States, as well as at common law, successive imprisonments may be assigned to successive convictions, the defendant being in prison at the time of the second or subsequent trials.¹ It is also held that upon a conviction of separate and distinct offenses charged in separate indictments or informations, or in separate counts in the same indictment or information, the court has power to impose cumulative sentences,²

these errors are sustained.—*Graham v. People*, 63 Barb. (N. Y.) 468; *Messner v. People*, 45 N. Y. 1, 1 Cow. Cr. Rep. 348. *Supra*, § 1706.

Under Code of Criminal Procedure (1884) the Court of Appeals may remit a case to the inferior court with instructions as to the sentence to be pronounced.—*People v. Bork*, 96 N. Y. 188, 2 N. Y. Cr. Rep. 177, reversing 31 Hun 360, 2 N. Y. Cr. Rep. 56.

¹ *Pegalow v. State*, 20 Wis. 61. *Supra*, §§ 1839, 1869.

² See *Bescher v. State*, 32 Ind. 480; *United States v. Harding*, 1 Wall. Jr. 127, Fed. Cas. No. 15301; *supra*, §§ 1452, 1839.

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³ *United States v. Gordon*, 5 Blatchf. 18, Fed. Cas. No. 15231.

¹ FLA.—*Wallace v. State*, 41 Fla. 547, 26 So. 713. GA.—*Fortson v. Elbert County*, 117 Ga. 149, 43 S. E. 492; *Hightower v. Hollis*, 121 Ga. 159, 48 S. E. 969. IOWA.—*Travis v. Hunter*, 109 Iowa 602, 80 N. W. 680. KAN.—*State v. Lewis*, 63 Kan. 268, 65 Pac. 257. MD.—*Rigor v. State*, 101 Md. 465, 61 Atl. 631.

See, also, *infra*, § 1874.

² CAL.—*People v. Forbes*, 22 Cal. 135. COLO.—*In re Packer*, 18 Colo. 525, 33 Pac. 578. CONN.—*State v. Smith*, 5 Day 175, 5 Am. Dec. 132. N. J.—*State v. Maheny*, 73 N. J. L. 53, 62 Atl. 265. PA.—

but they must be definite and certain;³ although it was held in Texas, that under the provisions of the code, the court has no authority to fix the commencement of a term in the penitentiary at the expiration of another term.⁴

§ 1873. PRISONER MAY BE BROUGHT UP FOR SECOND TRIAL BY HABEAS CORPUS. The proper process for obtaining jurisdiction of the person of a prisoner under sentence,¹ in

Brown v. Com., 4 Rawle 259, 26 Am. Dec. 130; *Russell v. Com.*, 7 Serg. & R. 489. UTAH—*People v. Flynn*, 7 Utah 378, 26 Pac. 1114. VA.—*Com. v. Leaths*, 3 Va. (1 Va. Cas.) 151. WIS.—*Petition of McCormick*, 24 Wis. 492, 1 Am. Rep. 197. FED.—*In re Esmond*, 42 Fed. 827. ENG.—*R. v. Wilkes*, 4 Bur. 2527, 98 Eng. Repr. 327.

As to cumulative sentences, see notes, 74 Am. St. Rep. 338; 87 Am. St. Rep. 110; 7 L. R. A. (N. S.) 125.

"It has long been well settled, in cases of this kind, where the prisoner has been convicted of several distinct offenses, that the court may give judgment upon each one of them, and, in doing so, may lawfully direct that the term of imprisonment for one shall commence at the expiration of that for another, and so on, until all the terms have expired."—*Dixon, C. J.*, in *Petition of McCormick*, 24 Wis. 492, 1 Am. Rep. 197.

Cumulative sentences may be imposed by federal courts without an act of congress expressly authorizing them to do so.—*In re Esmond*, 42 Fed. 827; *Howard v. United States*, 43 U. S. App. 678, 21 C. C. A. 586, 34 L. R. A. 509, 75 Fed. 986.

Escaped convict who has been

convicted and sentenced to the penitentiary for another crime, at the expiration of the term for the latter crime may be held to serve out the remainder of his sentence for the first crime.—*Henderson v. James*, 52 Ohio St. 242, 27 L. R. A. 290, 39 N. E. 805.

Three-term sentence imposed, first of which is served and second reversed, prisoner must serve last.—*Ex parte Jackson*, 96 Mo. 116, 8 S. W. 800.

³ *Petition of Bloom*, 53 Mich. 597, 19 N. W. 200; *In re Esmond*, 42 Fed. 827.

Sentence directed to commence "at expiration of sentence aforesaid," where "aforesaid" is unexplained, held to be invalid for uncertainty, in *Williams v. State*, 18 Ohio St. 46.

⁴ *Prince v. State*, 44 Tex. 480.

¹ Prisoner, committing murder while serving a sentence in the penitentiary, has some years still to serve, does not prevent his being sentenced to be hung before the expiration of his term.—*Thomas v. People*, 67 N. Y. 218, 2 Cow. Cr. Rep. 298.

Defendant imprisoned for life may be brought into court and convicted on an indictment for murder, and sentenced to be hung—*Peri v. People*, 65 Ill. 17.

order to try him for another crime, is by habeas corpus directed to the keeper of the prison.²

§ 1874. A SECOND IMPRISONMENT BEGINS AT TERMINATION OF FIRST. When a term of imprisonment is still unexpired, the prisoner being in custody, the proper course at common law is to appoint the second imprisonment to begin at the expiration of the first, to be specifically referred to in the sentence;¹ and a sentence to this effect, when the prior imprisonment is specified, is sufficiently exact.² The same order is taken when permitted by stat-

² State v. Wilson, 36 Conn. 126.

¹ CAL.—Dalton, Ex parte, 49 Cal. 463. CONN.—State v. Smith, 2 Day 175, 5 Am. Dec. 132. IOWA—Mieir v. McMillan, 51 Iowa 240, 1 N. W. 525. MASS.—Kite v. Com., 52 Mass. (11 Metc.) 584. MINN.—Mins v. State, 26 Minn. 498, 5 N. W. 374. OHIO—Williams v. State, 18 Ohio St. 46. PA.—Brown v. Com., 4 Rawle 259, 26 Am. Dec. 130; Mills v. Com., 13 Pa. St. 631, 634. VA.—Com. v. Leath, 3 Va. (1 Va. Cas.) 151. FED.—Peters, Ex parte, 4 Dill 169, Fed. Cas. No. 11027. ENG.—Wilkes v. R., 4 Bro. P. C. 361; R. v. Cutbush, L. R. 2 Q. B. Div. 379.

Compare: Ex parte Ryan, 76 Mo. 253, though see cases contra cited at close of this section.

After judgment and sentence on one count defendant, on a subsequent term, can not be sentenced on another count. See, supra, § 1849.

In Missouri, both convictions, to sustain successive imprisonments, must take place before sentence is pronounced in either case.—Meyers, Ex parte, 44 Mo. 279; Turner, Ex parte, 45 Mo. 331.

Same rule prevails in Indiana. See Kennedy v. Howard, 74 Ind. 87.

As to Texas statute, see Shumaker v. State, 10 Tex. App. 117; Sartain v. State, 10 Tex. App. 651, 38 Am. Rep. 649.

² People v. Forbes, 22 Cal. 135; State v. Hood, 51 Me. 363; Kite v. Com., 52 Mass. (11 Metc.) 581; Williams v. State, 18 Ohio St. 46; Com. v. Leath, 3 Va. (1 Va. Cas.) 151.

As to Massachusetts practice, see Haskins v. Com., 128 Mass. 60; supra, § 1849.

As to distinctive practice in New York, see, supra, § 1850.

But a sentence of imprisonment to commence after the expiration of former sentences is too indefinite.—Larney v. Cleveland, 34 Ohio St. 599.

See, supra, § 1872, footnote 3.

In a Pennsylvania case, the prisoner having been found guilty, under two counts charging a higher and a lesser crime, but for the same offense, the court below sentenced him to imprisonment for six years and four months under one count, and to imprisonment, at labor, for three years and ten months under the other count, both terms of imprisonment to commence from the date of the sentence. It was held that so much

ute, on simultaneous convictions, the sentence then prescribing that the term on the second offense is to begin on the expiration of the term assigned to the first offense.³ In such cases, if the prisoner is pardoned for the first offense, the imprisonment for the second begins at the date of the pardon;⁴ and when the judgment is reversed for either offense, the sentence will be remodelled so as to correspond.⁵ But, where it is provided by statute that imprisonment on conviction is to commence on the imposition of the sentence, it has been held that when there are several convictions, and several terms of imprisonment adjudged, such imprisonments run concurrently.⁶ But, if this view be extended to cases in which the offenses are charged in separate indictments, the effect would be that no matter how many offenses a man might commit he could only be tried for one; and if it be limited to cases where the offenses are joined in one indictment, this would compel the prosecution to place each offense in a separate indictment, which would often oppressively and vexatiously increase the defendant's expenses and costs.⁷ But, whatever we may think on this point, it is settled that when the second conviction is for an offense committed during the first imprisonment, the imprisonments do not run concurrently.⁸

of the judgment as imposed the shorter term of imprisonment was to be reversed.—*Johnston v. Com.*, 85 Pa. St. 54, 27 Am. Rep. 622. See *Miller v. Com.*, 23 Pa. St. 631.

³ *People v. Forbes*, 22 Cal. 135; *Fry, In re*, 3 Mack. (14 D. C.) 135, 12 Wash. L. R. 388; *R. v. Cutbush*, L. R. 2 Q. B. Div. 379.

⁴ *Kite v. Com.*, 52 Mass. (11 Metc.) 581; *Brown v. Com.*, 4 Rawl. (Pa.) 259, 26 Am. Dec. 130.

⁵ *Ibid.*; *Mills v. Com.*, 23 Pa. St. 631. See *Opinions of Justices*, 79 Mass. (13 Gray) 618.

⁶ *Miller v. Allen*, 11 Ind. 389;

Kennedy v. Howard, 74 Ind. 87; *Meyers, Ex parte*, 44 Mo. 279; *Roberts, Ex parte*, 9 Nev. 44, 16 Am. Rep. 1; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, discussed, *supra*, § 1850, note; *infra*, § 1943.

⁷ *Supra*, § 1850.

⁸ *Kennedy v. Howard*, 74 Ind. 87. See *Jones v. Ward*, 43 Mass. (2 Metc.) 271.

In Michigan, it is held that a sentence of imprisonment to commence after expiration of prior sentence can not be sustained in the absence of a statute.—*Bloom's*

§ 1875. **AN ESCAPED PRISONER MAY BE SENTENCED FOR ESCAPE IN LIKE MANNER.** A prisoner who escapes before the expiration of his term may be convicted of such escape and sentenced, while still imprisoned for his first offense, to a second imprisonment commencing on the expiration of the first.¹ When an escaped prisoner commits a second felony before the term of his imprisonment has expired, but during his escape, he may be put on trial for the second felony; and be sentenced, on conviction, to a term to commence at the expiration of the term for which he was imprisoned.² In any view, the imprisonment is not imputed until it actually commences.³

XIII. WHEN SEVERER PUNISHMENT IS ASSIGNED TO SECOND OFFENSE.

§ 1876. **SUCH STATUTES CONSTITUTIONAL.** Statutes are in force in several states providing that when a party is convicted of a second offense he is to be subjected to an aggravated penalty. Such statutes are not in conflict with the constitutional provision as to jeopardy.¹

§ 1877. **IN SUCH CASES PRIOR CONVICTION SHOULD BE AVERRED.** The indictment to sustain such second prosecu-

Case, 53 Mich. 597, 19 N. W. 200; Lamphere's Case, 61 Mich. 105, 27 N. W. 882.

And so in England as to felonies. —R. v. Cutbush, L. R. 2 Q. B. Div. 379.

¹ Brunding, Ex parte, 47 Mo. 255.

² Haggerty v. People, 6 Lans. (N. Y.) 332.

When a prisoner escapes from prison, and is retaken after his term expires, it is not necessary that there should be a new award of execution. He may be retaken and confined without any addi-

tional suggestion on behalf of the state, or trial of the question of his identity and escape.—Haggerty v. People, 53 N. Y. 476, 1 Cow. Cr. Repr. 532, reversing 6 Lans. (N. Y.) 332.

See cases, supra, § 1867.

³ Supra, § 1886.

¹ People v. Stanley, 47 Cal. 113; People v. Lewis, 64 Cal. 401, 1 Pac. 490; Boyle, In re, 64 Cal. 153, 28 Pac. 232; Com. v. Hughes, 133 Mass. 496; Ingalls v. State, 48 Wis. 647, 4 N. W. 785.

For discussion of statutes, see Com. v. Morrow, 9 Phila. 583.

tion must specially aver the prior conviction or convictions;¹ and when the court of the first prosecution is one of oyer and terminer, or general jurisdiction, an allegation of the fact of general jurisdiction is enough.² When, however, "the conviction is alleged to have taken place before a court of special and limited jurisdiction, the indictment should aver such facts as would show that the justice holding such court had jurisdiction, as well of the subject-matter as of the person of the prisoner."³ And where a prior "conviction" is requisite to sustain the second indictment, it is said that not only conviction, but the sentence imposed, should be averred, as conviction in its full sense, and within the scope of the statute, is not complete without the judgment of the court.⁴ Under some statutes there must be a special verdict as to the former conviction.⁵

¹ CAL.—*People v. Carlton*, 57 Cal. 559. MD.—*Maguire v. State*, 47 Md. 485. MASS.—*Plumbey v. Com.*, 43 Mass. (2 Mete.) 413; *Garvey v. Com.*, 74 Mass. (8 Gray) 382. OHIO.—*Larney v. Cleveland*, 34 Ohio St. 599. PA.—*Rauch v. Com.*, 78 Pa. St. 490. VA.—*Rand v. Com.*, 50 Va. (9 Gratt.) 938. ENG.—*R. v. Page*, 9 Car. & P. 756, 38 Eng. C. L. 437; *R. v. Allen*, 1 R. & R. 513; *R. v. Willis*, L. R. 1 C. C. 363.

Apparently *contra*, was under a special statute.—*State v. Freeman*, 27 Vt. 523.

In Louisiana it is held improper to aver the previous conviction; and this is consistent with the position advocated in the text that the previous conviction should be kept out of the case.—*State v. Hudson*, 32 La. Ann. 1052.

In New York, it is unnecessary to aver, in the second indictment,

the prior conviction.—*Johnson v. People*, 65 Barb. (N. Y.) 342; affirmed, 55 N. Y. 512, 2 Cow. Cr. Rep. 48. But see *Gibson v. People*, 5 Hun (N. Y.) 542, 2 Cow. Cr. Rep. 400.

Verdict for a second offense, in order to sustain the cumulative punishment, must aver the offense to be a second offense.—*Maguire v. State*, 47 Md. 485.

² *People v. Golden*, 3 Park. Cr. Rep. (N. Y.) 330. See *State v. Volmer*, 6 Kan. 379.

³ *Jewell, J., People v. Powers*, 2 N. Y. 50, affirming 7 Barb. 462, citing 1 Chitty Cr. L. 138.

⁴ *Smith v. Com.*, 14 Serg. & R. (Pa.) 69.

Contra: Stevens v. People, 1 Hill (N. Y.) 261.

As to averment in homicide cases, see *Kane v. Com.*, 109 Pa. St. 541.

⁵ *Rector v. Com.*, 80 Ky. 468.

§ 1878. FORMER CONVICTION MUST BE LEGAL. FOREIGN CONVICTION INSUFFICIENT. To sustain the averment of the first conviction it must appear that such conviction was legal,¹ and in a court having jurisdiction.²

A foreign conviction will not sustain the averment, and can not be made the basis of an aggravated penalty.³

Under local statutes the former conviction need not be a conviction of the same character as that under trial.⁴

§ 1879. CONVICTION TO BE PROVED BY RECORD AND IDENTIFICATION. The averment of prior conviction is to be proved by the record,¹ sustained by proof of the identity of the person on trial with the one described in the former procedure,² as in cases of pleas of former conviction.

§ 1880. PROSECUTION MAY WAIVE FIRST CONVICTION. The prosecution may elect, if it choose, to ignore the first conviction, and proceed exclusively on the offense under trial, as if it stood alone.¹

§ 1881. PRIOR CONVICTION NOT TO BE PUT IN EVIDENCE UNTIL MAIN ISSUE IS FOUND AGAINST DEFENDANT. On the trial of cases in which prior convictions are alleged, is the prosecution to put in evidence, as part of its case, such prior conviction? To do so, it is argued, would be to vio-

¹ Former proceeding can not be overhauled for technical errors.—*Kelly v. People*, 115 Ill. 583, 56 Am. Rep. 184, 4 N. E. 644.

² See *State v. Dolan*, 69 Me. 573; *People v. Butler*, 3 Cow. (N. Y.) 347; *Rand v. Com.*, 50 Va. (9 Gratt.) 738.

³ *People v. Cæsar*, 1 Park. Cr. Rep. (N. Y.) 345.

⁴ *People v. Raymond*, 93 N. Y. 38, affirming 32 Hun 123, 2 N. Y. Cr. Rep. 295.

¹ *Tuttle v. Com.*, 68 Mass. (2 Gray) 502; *Johnson v. People*, 65 Barb. (N. Y.) 342; affirmed, 55

N. Y. 512, 2 Cow. Cr. Rep. 48; *R. v. Willis*, L. R. 1 C. C. 363.

² *Supra*, § 1417; *Hines v. State*, 26 Ga. 614; *Smith v. Com.*, 14 Serg. & R. (Pa.) 69; *R. v. Clark*, 6 Cox C. C. 210.

An averment of prior conviction of C. D. and D. H. may be sustained by proof of their conviction severally at different times more than six years previously.—*Dolan v. State*, 69 Me. 573.

When there is a variance in the names oral evidence of identity is admissible.—*Ibid.* *Supra*, § 1417.

¹ *R. v. Summers*, L. R. 1 C. C. 182.

late the established principle that a man's character and his previous bad acts are not to be put in evidence unless at his own instance,¹ as well as to invade another well settled safeguard of justice, that the defendant is to be tried, not for being generally bad, but only for the one particular bad act. A majority of the English judges having held, however, in 1834, that it was admissible for the crown to put the prior conviction before the jury as part of its evidence in chief;² an act of parliament was passed directing that the prior conviction should not be committed to the jury until they had found the defendant guilty of the subsequent charge, unless he himself puts his character in evidence.³ In several of the American states similar restrictions exist. Where they do not, it would be well for courts in charging juries to direct them to scrupulously avoid considering the conviction in the prior case as in any way affecting the question of guilt in the case on trial. It should also be remembered that it is much more important to society that the issues of guilt should be single, than that in any one particular case a cumulative sentence should be imposed. On the other hand, as it is necessary, according to the prevailing opinion, that the former conviction should be averred in the indictment, it is hard to see how it can be kept from the jury. The indictment goes to the jury as part of the record. And not only must it thus communicate its contents to the jury, but its essential allegations, of which this is one, must be sustained by proof. And part of this

¹ See 1 Whart. Crim. Ev. (Hilton's ed.), §§ 59-61.

² Johnson v. People, 65 Barb. (N. Y.) 342; affirmed, 55 N. Y. 512, 2 Cow. Cr. Rep. 48; Long v. State, 36 Tex. 6; R. v. Jones, 6 Car. & P. 391, 25 Eng. C. L. 489.

Compare: Wood v. People, 53 N. Y. 511, 1 Cow. Cr. Rep. 554.

If defendant pleads guilty to the indictment the averment of the prior conviction need not be proved.—People v. Delany, 49 Cal. 394.

³ R. v. Key, 5 Cox C. C. 369, 2 Den. C. C. 347; R. v. Martin, L. R. 1 C. C. 214.

proof, as we have just seen, goes to the fact of identity of person, on which the jury has to pass.⁴

XIV. DISFRANCHISEMENT AND INCAPACITATION.

§ 1882. CONVICTION A PREREQUISITE. By the Act of Congress of July 17, 1862, it is provided that all persons guilty of engaging in rebellion shall be incapable of holding office. It has been ruled that as a penalty for crime it is within the power of Congress to impose upon a convicted person disfranchisement of this class.¹ But to attach the disqualification, under this or under similar state enactments, there must be a conviction in due course of law,² and the conviction must go to an offense to which the penalty of disfranchisement is attached.³ Disfranchisement is not a cruel and unusual punishment.⁴

§ 1883. — AND SO OF FORFEITURE OF OFFICE. A conviction for felony necessarily works a forfeiture of an office the holding of which is incompatible with the endurance of the disgrace and of the punishment imposed on the conviction.¹

⁴ Supra, § 1877.

In *Maguire v. State*, 47 Md. 497, it is said by Alvey, J.: "Such being the import of the averment, and the nature of the inquiry before the jury, there can be no good reason for adopting the mode of procedure contended for by the appellant; and the practice in England, until changed by statute, was, as it is here, to allow the prosecution to put the prior conviction before the jury as part of its evidence in chief, and before the accused commenced his evidence in defense.—*R. v. Jones*, 6 Car. & P. 391, 25 Eng. C. L. 489."

To same effect, see *Thomas' Case*, 68 Va. (22 Gratt.) 912.

¹ *Huber v. Riley*, 53 Pa. St. 112.

² See *The Amy Warwick*, 2 Spr. 143, 24 Law Rep. 335, Fed. Cas. No. 342; affirmed, sub nom. *Prize Cases*, 67 U. S. (2 Black) 635, 17 L. Ed. 459, 479; *United States v. Watkins*, 11 Rep. 560, sub nom. *United States v. Wadkins*, 7 Sawy. 85, 5 Fed. 152.

³ *State v. Lynch*, (N. J.) 5 Cr. Law Mag. 379. See *Wilson v. State*, 28 Ind. 393.

⁴ *Huber v. Riley*, 53 Pa. St. 112.

¹ *State v. Carson*, 27 Ark. 470; *Com. v. Fugate*, 29 Va. (2 Leigh) 725.

As to pardons in such cases, see, supra, § 1458.

§ 1884. — AND SO OF CAPACITY AS A WITNESS. At common law, a person convicted of an infamous offense is incapacitated as a witness. What is "infamous" under the federal Constitution has been discussed in a prior section.¹ As will be seen in another volume, incapacitation of witnesses by infamy is now generally removed by statute.²

IV. JOINT SENTENCES.

§ 1885. JOINT DEFENDANTS MAY EACH BE PUNISHED TO THE FULL AMOUNT. SEVERAL SENTENCES. Where two or more persons are sentenced jointly to pay a fine, each may be fined up to the full statutory limit. That limit is not that a certain lumping sum is to be paid to the state by all the defendants together; but it is that each wrongdoer is to be made liable to pay such amount in full for his own particular violation of the law.¹ The fact that he is joined with others in the conviction and sentence does not lessen his liability.² The same rule applies to the distribution of imprisonment. Each defendant is to be singly sentenced according to his personal deserts, and, if necessary, to the full limit of the law.³ When, however, the verdict,

¹ Supra, § 130.

² 1 Whart. Cr. Ev. (Hilton's ed.), § 363.

³ It is otherwise in actions civil or quasi civil, when the object is to obtain redress for a private person. See *Boutelle v. Nourse*, 4 Mass. 431.

² Supra, § 365; 2 Hawk. P. C. 635. ALA.—*McLeod v. State*, 35 Ala. 395. IND.—*State v. Hopkins*, 7 Blackf. 494. KY.—*Caldwell v. Com.*, 37 Ky. (7 Dana) 229. MASS.—*Com. v. Tower*, 49 Mass. (8 Metc.) 527. MO.—*State v. Gay*, 10 Mo. 440. S. C.—*State v. Smith*, 1 Nott. & McC. L. 13. VA.—*Com.*

v. Ray, 3 Va. (1 Va. Cas.) 262; *Com. v. Harris*, 48 Va. (7 Gratt.) 600. WIS.—*Waltzer v. State*, 3 Wis. 785. ENG.—*R. v. Atkinson*, 2 Ld. Raym. 1248, 92 Eng. Repr. 322. ³ Supra, § 365; 2 East P. C. 740. ARK.—*Calico v. State*, 3 Ark. (3 Pike) 431. IND.—*Sturgeon v. Gray*, 96 Ind. 166. IOWA.—*State v. Hunter*, 33 Iowa 361. MO.—*State v. Berry*, 21 Mo. 504. S. C.—*State v. Smith*, 1 Nott. & McC. L. 13. FED.—*United States v. Babson*, 1 Ware 450, Fed. Cas. No. 14489. ENG.—*R. v. King*, 1 Salk. 182, 91 Eng. Repr. 166.

As to joinder of defendants, see, supra, § 351.

under statute, is for a gross sum by way of full satisfaction, it is error to impose the whole fine separately on each defendant.⁴

The subject of costs has been already discussed.⁵

XVI. BINDINGS TO KEEP THE PEACE.

§ 1886. DEFENDANT, AFTER VERDICT, MAY BE BOUND OVER TO KEEP THE PEACE. There are cases when, in addition to, or as an alternate for, fine and imprisonment, the court will hold over the defendant in bonds to keep the peace,¹ or to abate or discontinue the offense for which he was tried.² And this holds good even after acquittals, whenever the judge trying the case has sufficient reason, from the evidence before him, to judge such course necessary to prevent a violation of public peace and law. This power is inherent in all justices of the peace. But unless necessary to protect the public from notorious crime, the court, after acquittal, will not direct the defendant to be detained until articles of peace against him are prepared.³

XVII. CONSIDERATIONS IN ADJUSTING SENTENCE.

§ 1887. COURTS HAVE USUALLY LARGE DISCRETION. The polity of England and of the United States commits largely to the court the practical determination of the grade of punishment.¹ In England, and in several of our

⁴ Flynn v. State, 8 Tex. App. 398, overruling Bennett v. State, 30 Tex. 523.

⁵ Supra, §§ 365, 366.

¹ Estes v. State, 21 Tenn. (2 Humph.) 496; Dunn v. R., 12 Ad. & E. N. S. (12 Q. B.) 1031, 64 Eng. C. L. 1030; O'Connell v. R., 11 C. & F. 155, 8 Eng. C. L. 1061; supra, § 121.

² See Kerr's Whart. Crim. Law, §§ 128, 1692, 1788.

³ R. v. Holt, 7 Car. & P. 518, 32 Eng. C. L. 737. Supra, § 121.

¹ Court may take testimony on this point. See Dick v. State, 3 Ohio St. 89.

On the question of character, as well as on that of the grade of the crime, affidavits may be received in mitigation or aggravation. Infra, § 1890.

As to recommendation to mercy, see, supra, § 1690.

Three theories have been propounded as to the discretion of the judge in criminal prosecutions. See Berner, § 124.

states, until a very recent period, the court, in misdemeanors, was left without any limit as to the term of imprisonment to be imposed, provided that a maximum, in some cases of seven years, in others of ten years, should not be exceeded. Even now we find frequently such limitations as these: imprisonment from "two to fifteen years," or from "two to ten," or "one to seven years." In such cases the question of determining what penalty is to be assigned to a particular offense rests mainly on the discretion of the court.² It becomes important, therefore, to consider on what principles this discretion is to be

(1.) By the first his duties are to be prescribed in every respect by statute. Statute is to define the offense; statute is arbitrarily to specify the punishment. It is obvious that this theory is both despotic and illogical. Cases, nominally of the same offense, as defined in the statute book, e. g., larceny, are so various that it would be gross injustice to apply to each the same uniform penalty. Hence there is no code which does not leave a margin, as to the term of punishment, within which the discretion of the judge may range. Nor, so far as concerns the definition of an offense, is it possible for the theory here contested to be logically executed. A statute, for instance, makes "burglary" indictable. But what is burglary? This has to be determined by the courts. Even if the definition is given by statute, the points of discrimination, in accordance with the well-known logical rule, increase with the minuteness of the specification.

(2.) By the second view the statute declares a particular offense to be punishable, but leaves the punishment absolutely to the dis-

cretion of the judge. But this theory, in not imposing at least a maximum of punishment, leaves too much to the caprice of the judge.

(3.) The offense is defined by statute, and the discretion of the judge is allowed to work within a specified margin of punishment. This is a system now almost universally prevalent in the United States.

Whether a minimum as well as a maximum should be attached has been much discussed. Berner, § 124, argues that to leave the limits open is an abdication of duty by the legislature, and leads to despotic and wayward caprice on the part of the judge. Rossi (*Traité*, vol. ii, 405) says: "*La loi perdrait une grande partie de son influence préventive sur l'esprit des citoyens. La jurisprudence des tribunaux serait incertaine, variable; elle ne tarderait pas à offrir des disparates choquantes. Le juge aurait un moyen trop facile de céder, sans trop aventuré sa responsabilité morale, à la prière, à l'intrigue, aux séductions de toute espèce.*"

² *Supra*, §§ 365, 366. See cases in

exercised. What object is the judge to have before him in adjusting punishment to crime? What public exigencies has he to satisfy? In answering these inquiries we are met by several conflicting theories.

§ 1888. PRIMARY OBJECT RETRIBUTION; BUT EXAMPLE AND REFORM TO BE INCIDENTAL. It has been shown elsewhere,¹ that the primary object of punishment is the execution of retributory justice; and that unless such justice be shown in a sentence, it is calculated neither to deter others from crime nor to reform the sentenced criminal. At the same time, as is there noticed, example and reform, as well as retribution, are to be kept in view in adjusting a sentence. On these points the following observations may be made:

1. Example. An excessive punishment, so far from being an example, as sometimes judges conceive it to be, operates in the contrary direction; first, because the public mind revolts at the undue severity, and an angry contempt of justice is thereby engendered; and, secondly, because excessive punishments are apt to be revoked by the executive, and there is the feeling about them, "This can not last." Even supposing certain crimes are so prevalent, that at the first glance it would seem politic to signalize convictions by extreme and conspicuous penalties, it must be remembered, in addition to the considerations already given, that the public mind soon adapts itself to a harder grade of punishment, and that the immediate effect is to require increased punishment for all crimes, not simply an exceptional punishment for the particular crime complained of. Aside from this, there is a sense of unfairness about punishment so inflicted that defeats the very end it is claimed to promote. Men will not be prevented from committing crime by seeing punishment

prior notes to this section.—People v. Warden, 66 N. Y. 342.

11 Kerr's Whart. Crim. Law, §§ 1 et seq. Hawkins v. People, 106 Ill. 623.

inflicted merely to work such prevention. If the person punished is guilty, and is punished because he is guilty, this acts as a deterrent. But if he is innocent, and is punished, without his consent, in order to produce a docile and law-loving temper in himself and others, the effect is far from being reached. Such an outrage inflicted on him, so far from making him docile and law-loving, will be likely to breed in him a determination to resist, to elude, and, if possible, to trample upon, the sovereign from whom the outrage proceeds; and the temper thus generated in him will be generated in those who are witnesses of the wrong done him. Such, in fact, has been the case where this system has been carried out. At no times have crimes been more rife, and schemes to defy or elude the law more rampant, than in those in which punishments for the sake of example were made most conspicuous and horrible. Nor is this all. To assign this power to the sovereign is to invest him with absolutism. If the object is merely to deter others by a fearful spectacle of torture or death, then innocent as well as guilty may be seized upon as the victims by whom the spectacle is to be exhibited; and the pain inflicted will be measured, not by its relation to the alleged offense, but by the effect it is likely to produce on the public mind. When there is no logical relation between wrong and punishment, justice will be a matter of mere arbitrary, sensational display. The object will be to inflict a conspicuous and horrible penalty arbitrarily, and thus to terrify into submission. But this can only be sustained by the ascription to the sovereign of absolute power.

2. Reform. The object of reform is to arouse, by moral and religious influences, the torpid moral sense of the convict, and to form in him habits of honesty, self-control, and obedience to the law; and so far it is an important auxiliary in penal discipline. But reform should not be carried to such a degree as to diminish the necessary painfulness of punishment, since a punishment which does not

inflict pain in some degree proportionate to the crime committed, so far from reforming the criminal, will lead him to regard the wrong done by him as a light thing, so viewed by the public, and tend rather to encourage than to check him in a lawless career. And independent of this moral mischief, a home in which board, lodging, and education are given without expense, will, to the idle and destitute, be a refuge rather to be sought than shunned. To invest, also, the sovereign with the power of compulsory reformation, irrespective of conviction of crime, requires the cession to him of despotic prerogatives. If susceptibility to reformation is the condition of penal discipline, there is no one on whom penal discipline may not be inflicted, as there is no one who may not be more or less reformed. Not only would this make the sovereign the master of the persons of all his subjects, but he would be relieved from fixed restrictions as to the nature of the punishment to be imposed, since the only question in such cases would be, "What kind of punishment would work reformation in a person of this particular type?" And, once more, no obdurate and irreclaimable criminal could, on this view, be punished, for the reason that no such criminal could be reformed. Reformation, therefore, if it be adopted as the sole ground and object of punishment, would confer an entire immunity from restraint or punishment on the desperate and incorrigible criminal, while over all others it would establish the surveillance of despotism.

3. Retribution. This, so far as concerns public justice, is the primary object of punishment. When, however, an individual, as well as the body politic, is aggrieved, then it is proper, in cases of pecuniary loss, that there should be a pecuniary satisfaction ordered to the party injured. When the offense is one which assails the honor of an individual (as in cases of libel), it is the practice in some jurisdictions to require of the convict an apology, and withdrawal of the charge. And, incidentally, in the appli-

cation of retribution, prevention and reformation should be subserved.²

§ 1889. — ADJUSTING SENTENCE. In adjusting sentence, therefore, under our American system, which allows so wide a discretion to the court, not only the simplest but the wisest course for the court is to adapt the duration of imprisonment to the defendant's guilt, keeping at the same time in view, as forming part of the elements of this guilt, his character, of which susceptibility to reformatory influences is an ingredient.¹ By so doing, if guilt be estimated according to its inveterateness and heinousness, and its sentence moulded accordingly, the objects of the preventive and reformatory systems will be best promoted. And if such a policy be firmly executed, the advantages of what has been called the exemplary theory will be best brought out. The criminal himself will receive the punishment which in justice belongs to his crime. And the example of such punishment, based, not on any capricious or speculative schemes, but on the plain principle that crime is punished because it is crime, will act as a deterrent just in proportion as it is justly imposed and firmly executed.

§ 1890. — EVIDENCE MAY BE RECEIVED IN AGGRAVATION OR MITIGATION OF GUILT. Although, when the punishment is to be assessed by the jury, it is improper, in order to keep the issue single, to receive evidence of other offenses than that charged in the indictment, or part of a system of which such offense is part,¹ it is otherwise when, after a verdict of guilty, the court is called upon to sentence. In such case the court may, of its own motion, take notice of a prior conviction of the defendant on its own records, or will hear proof of his character and antecedents, either to

² For a full discussion, see 1 Kerr's Whart. Crim. Law, §§ 1 et seq., and see, also, 15 Am. Law Rev. 127.

¹ See 1 Kerr's Whart. Crim. Law, §§ 12, 22.

¹ See 1 Whart. Crim. Ev., (Hilton's ed.), §§ 23 et seq.

aggravate or extenuate his guilt.² The proof in the latter relation is taken usually by affidavits.³ Such evidence, however, is only receivable in matters as to which the court has discretion.⁴

XVIII. EX POST FACTO PENALTIES.

§ 1891. **HOW FAR CONSTITUTIONAL.** In other volumes is considered the question how far ex post facto legislation

² ALA.—*Robbins v. State*, 20 Ala. 36. ARK.—*Sarah v. State*, 18 Ark. 114. CAL.—*People v. Jefferson*, 52 Cal. 453. MASS.—*Com. v. Horton*, 26 Mass. (9 Pick.) 206. N. Y.—*People v. Cochran*, 2 John. 73. OHIO.—*Dick v. State*, 3 Ohio St. 89. ENG.—*R. v. Mahon*, 4 Ad. & E. 475; *R. v. Dignam*, 7 Ad. & E. 593, 34 Eng. C. L. 316; *R. v. Gregory*, 1 Car. & K. 228, 47 Eng. C. L. 228; *R. v. Morgan*, 11 East 457, 103 Eng. Repr. 1080; *R. v. Templeman*, 1 Salk. 55, 91 Eng. Repr. 54; *R. v. Wilson*, 4 T. R. 487, 100 Eng. Repr. 1134.

The common law rule that such evidence can not be received in cases of felony applies only to such felonies as are capital. See *R. v. Ellis*, 6 Barn. & C. 145, 13 Eng. C. L. 76.

³ *Roscoe's Crim. Ev.*, § 222.

⁴ *R. v. Ellis*, 6 Barn. & C. 145, 13 Eng. C. L. 76; *Burn's Just.* (29th ed.), § 933.

Court would not hear proof of utterly distinct offenses, was held in *Skains v. State*, 21 Ala. 218, and *Ingraham v. State*, 39 Ala. 247.

The English practice is thus stated in *Roscoe's Crim. Ev.*, pp. 222-223:

"Where the defendant has been *Crim. Proc.*—146

convicted of a misdemeanor in the Queen's Bench, the prosecutor, upon the motion for judgment, may produce affidavits to be read in aggravation of the offense, and the defense may also produce affidavits to be read in mitigation. Affidavits in aggravation are not allowed in felonies, although the record has been removed into the Court of Queen's Bench by certiorari."—*R. v. Ellis*, 6 Barn. & C. 145, 13 Eng. C. L. 76; 3 *Burn's Justice* (29th ed.) 933.

—Where a prisoner pleaded guilty at the Central Criminal Court to a misdemeanor, and affidavits were filed both in mitigation and aggravation, the judges refused to hear the speeches of counsel on either side, but formed their judgment of the case by reading the affidavits (*R. v. Gregory*, 1 Car. & K. 228, 47 Eng. C. L. 228); but it is usual to hear counsel in mitigation. See, also, the same case as to removing from the files of the court affidavits in mitigation containing scandalous and irrelevant matter, such being a contempt of court; and also as to allowing the opposite party to deny by counter-affidavits the affidavits filed in mitigation.—See, *supra*, § 1345.

is constitutional in respect to crime,¹ and it is there shown that a statute imposing an increase of punishment does not apply to crimes committed before its passage. It is otherwise in respect to statutes lessening the penalty, which may be applied to prior offenses.² What are to be considered lesser penalties is elsewhere discussed.³

XIX. BENEFIT OF CLERGY.

§ 1892. NOW ABOLISHED. By the old English common law, persons who were in clerk's orders, and afterwards all persons whatsoever, were entitled to be relieved from capital punishment, unless otherwise ordered by statute, on being burned in the hand. The object was to mitigate the ferocity of the then penal system by which to all felonies death was assigned. With the subsequent reduction and amelioration of punishments the reason ceased; and benefit of clergy by act of Parliament ceased to exist in 1828. In this country, although in some states recognized as part of the common law,¹ it has been now universally abolished either by express enactment or by implication.

¹ 1 Kerr's Whart. Crim. Law, § 43; Whart. Com. Am. Law, § 473.

² Com. v. Wyman, 66 Mass. (12 Cush.) 237; Veal v. State, 8 Tex. App. 474; Perez v. State, 8 Tex. App. 610.

³ 1 Kerr's Whart. Crim. Law, § 42.

¹ It was abolished in federal process in 1790.—U. S. Rev. Stats., § 5329, 2 Fed. Stats. Ann., 1st ed.,

p. 355; United States v. Ballard, 3 McL. 469, Fed. Cas. No. 14507.

As to state courts, see State v. Gray, 5 N. C. (1 Murph. L.) 147; State v. Carroll, 24 N. C. (2 Ired. L.) 257; State v. Sutcliff, 4 Strob. L. (S. C.) 372.

Benefit of clergy was recognized in Kentucky until abolished by statute in 1847. See Shaler's Kentucky 407.

CHAPTER XCIX.

CONTEMPT.

I. INTRODUCTORY.

§ 1893. In general.

II. WHEN THE ONLY METHOD OF SUPPRESSION IS BY SUMMARY COMMITMENT.

§ 1894. In such cases attachment may issue.

§ 1895. Attachments may issue to enforce process.

§ 1896. — And so as a penalty on disobedience.

§ 1897. — And so on physical interference with parties.

§ 1898. — And so on publication of proceedings ordered not to be published.

§ 1899. — And so as to misconduct of officers of court.

§ 1900. — And so as to obstruction to trial.

§ 1901. — And so as to disorder in presence of court.

§ 1902. — And so as to misconduct of, or tampering with, jurymen.

III. WHEN THE CONTEMPT CAN BE SUPPRESSED OTHERWISE THAN BY COMMITMENT.

§ 1903. Criticisms on cases before court constitute contempt.

§ 1904. — And so as to other publications interfering with due course of justice.

§ 1905. — But summary commitment only to be used when necessary.

§ 1906. In cases of this class an ordinary prosecution is the better course.

§ 1907. Danger of depositing such power in courts.

IV. BY WHOM SUCH COMMITMENTS MAY BE ISSUED.

§ 1908. Superior Courts have power to issue common-law commitments.

§ 1909. Other courts are limited to contempt in their presence; practice as to commissioners and notaries.

§ 1910. — So as to legislatures.

V. INDICTABILITY OF CONTEMPTS; EMBRACERY.

§ 1911. Interference with public justice indictable.

§ 1912. — So with embracery, or improper interference with jury.

VI. PRACTICE.

§ 1913. In cases in face of court, rule may be made instantly returnable.

§ 1914. — Otherwise as to contempts not in face of court.

§ 1915. Hearing may be inquisitorial.

VII. PUNISHMENT.

§ 1916. Court may fine and imprison.

§ 1917. Commitment must be for fixed period.

§ 1918. Fine goes to state.

VIII. CONVICTION NO BAR TO OTHER PROCEEDINGS.

§ 1919. Contempt not barred by other procedure.

IX. APPEAL, ERROR, AND PARDON.

§ 1920. When on record, proceedings may be revised in error.

§ 1921. When by habeas corpus.

§ 1922. Pardon does not usually release.

I. INTRODUCTORY.

§ 1893. IN GENERAL. Contempt is such disrespect or disobedience to a court or legislature as interferes with the due administration of law.¹ So far as concerns our first inquiry, contempts may be divided as follows:

¹ See Field Fed. Courts 435. Ann. Cas. 267; 15 Ann. Cas. 253;
As to power of courts to punish 17 L. R. A. (N. S.) 1049.
for contempt, see notes 98 Am. In Tennessee, under statute, in-
Dec. 413; 2 Am. St. Rep. 487; 8 ferior courts have no power to

(a) When the only method of suppression is by summary commitment;

(b) When there are other methods of suppression.

II. WHEN THE ONLY METHOD OF SUPPRESSION IS BY SUMMARY COMMITMENT.

§ 1894. IN SUCH CASE ATTACHMENT MAY ISSUE. In such cases there is no question that an attachment, on due cause shown, may issue, and the defendant be committed.

§ 1895. ATTACHMENT MAY ISSUE TO ENFORCE PROCESS. If process be impeded, no case can be tried. Hence it is a contempt, punishable by summary commitment, to interfere with process;¹ to disobey rules or orders, obedience to which is essential to the progress of the case;² to abuse process;³ to rescue a prisoner under process;⁴ and to serve a writ (the offender being the sheriff) improperly, or to refuse to serve it at all, or to make a false return.⁵

§ 1896. — AND SO AS A PENALTY ON DISOBEYING PROCESS. The same remedy is applicable to disobedience to an injunction, because unless attachment and commitment in such case be granted, irreparable injury might ensue;¹ to disobedience to an order of court for summary payment,

punish for contempt.—See *State v. Galloway*, 45 Tenn. (5 Cold.) 326, 98 Am. Dec. 404.

¹ *Daniell's Chancery Prac.* (1871) 387, notes 411-427, 939; *Buck v. Buck*, 60 Ill. 115; *People v. Bradley*, 60 Ill. 390; *State v. Sparks*, 27 Tex. 627; *Price v. Hutchison*, L. R. 9 Eq. 534.

² *Daniell's Ch. Prac.* (1871) 937; *Day's Com. Law Pr.* (1872) 313; *Archbold's Q. B. Practice* (12th ed.) 1711.

³ *Archbold's Q. B. Prac.* (12th ed.) 1715.

⁴ *Archbold's Q. B. Prac.* (12th ed.) 1710.

⁵ *Archbold's Q. B. Prac.* (12th ed.) 1710; *State v. Tipton*, 1 Blackf. (Ind.) 166; *People v. Marsh*, 2 Cow. (N. Y.) 493; *Summers, Ex parte*, 27 N. C. (5 Ired. L.) 149; *Pitman v. Clarke*, 1 McMul. L. (S. C.) 316.

¹ *Wait's Prac.* (1873) 108, 112; *Day's Common Law Prac.* (1872) 327; *Daniell's Chan. Prac.* (1871) 1533; *Rogers Man. Co. v. Rogers*, 38 Conn. 121; *People ex rel. Davis v. Compton*, 8 Sup. Ct., 1 Duer (N. Y.) 512; affirmed in *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263; *Mead v. Norris*, 21 Wis. 310; *Potter v. Muller*, 1 Bond. 601, Fed.

which payment can not be otherwise enforced;² and to disobedience to an order for specific conveyance.³

§ 1897. — AND SO ON PHYSICAL INTERFERENCE WITH PARTIES AND RECEIVERS. It is also a contempt summarily punishable to prevent a party from bringing suit, because in such case it would beg the question to turn the plaintiff back to a common-law suit for redress;¹ and to carry off a ward in chancery, attachment being the only mode of enforcing obedience.² It has also been held to be a contempt to resist the action of the receivers of a railroad corporation, such receivers being duly appointed by the court.³

§ 1898. — AND SO ON PUBLICATION OF PROCEEDINGS ORDERED NOT TO BE PUBLISHED. It is a contempt, also, to publish testimony which the court has ordered not to be published, when the injury can not be otherwise redressed.¹

§ 1899. — AND SO AS TO MISCONDUCT OF OFFICERS OF COURT. An officer of the court may so conduct himself during the trial of a cause, as to inflict, if not stopped, irreparable injury; and in such case attachment for contempt is the proper, because the only, remedy. This rule is applied to all misbehavior, in the presence of the court, of attorneys or other officers of the court.¹ And it has

Cas. No. 11333; *Woodworth v. Rogers*, 3 Wood. & M. 135, Fed. parte, 13 Ves. 237, 33 Eng. Repr. 283.

Cas. No. 18018.

² *Wellesley, In re*, 2 Rus. & M. 639.

² 2 *Wait's Prac.* (1873) 249;

Remley v. De Wall, 41 Ga. 466;

Ford v. Ford, 10 Abb. Pr. N. S. (N. Y.) 74, 41 How. Pr. 169;

Fischer v. Raub, 56 How. Pr. (N. Y.) 218.

³ *Daniell's Ch. Prac.* (1871) 1533.

As to alimony, see *Bissell, In re*, 40 Mich. 63.

¹ See *Whittem v. State*, 36 Ind. 196; *Littler v. Thomson*, 2 Beav. 129, 48 Eng. Repr. 1129; *Jones, Ex*

³ *Doolittle, In re*, 23 Fed. 550; *Higgins, In re*, 27 Fed. 443; *United States v. Kane*, 6 Cr. L. Mag. 530.

¹ *R. v. Clement*, 4 Barn. & Ald. 218, 6 Eng. C. L. 458.

¹ *Archbold's Q. B. Prac.* (12th ed.) 1710; *Woolley, In re*, 74 Ky. (11 Bush) 95; *Robinson, Ex parte*, 86 U. S. (19 Wall.) 505, 22 L. Ed. 205; *Pitman's Case*, 1 Curt. 186, Fed. Cas. No. 11184.

been justly extended (not only because such misconduct, consistently with prompt justice, can not be otherwise properly corrected, but because such officers are the court's confidential servants, trusted by² third parties as

As to extraordinary instance of exercise of this power, see proceedings in Tweed's Case, 60 N. Y. 5, cited *supra*, § 1538; 20 Cent. L. J. 23.

Attorney drafting petition for rehearing on part of strangers to action, not guilty of contempt therefor.—State v. Hansford, 43 W. Va. 776, 28 S. E. 792.

As illustrating the necessity of the check, see, *supra*, §§ 1496 et seq.

Attorney publishing libelous charge against judge in newspaper, not punishable for contempt, under West Virginia statute.—State v. McClaugherty, 33 W. Va. 255, 10 S. E. 407.

Publication by an attorney, after a case is ended, reflecting on the court, will not be punished as a contempt.—State v. Anderson, 40 Iowa 207.

Otherwise where the publication is made while the case is still pending.—In re Woolley, 74 Ky. (11 Bush) 95.

Attorney's violation of oral stipulation not punishable as a contempt.—Ex parte Buskirk, 25 U. S. App. 613, 72 Fed. 20.

Circular letter reflecting on conduct of cause, not punishable as a contempt.—Hillman v. Mutual Life Ins. Co., 79 Fed. 751.

Contempt to charge a judge with prejudice in deciding a motion for a new trial.—See Harrison v. State, 35 Ark. 458; but *aliter* on motion for change of venue.—Curtis, Ex parte, 3 Minn. 274.

Failure of counsel to obey order of court to turn over money collected for client.—Kirk v. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501, 505, 508. See Burns v. Allen, 15 R. I. 32, 2 Am. St. Rep. 844, 23 Atl. 35.

Juror corruptly conferring with party during trial, guilty of contempt of court.—In re May, 2 Flipp. 568, 1 Fed. 742.

Offering money to witness in hallway held to be misbehavior in presence of the court.—Petition of Savin, 131 U. S. 276, 33 L. Ed. 153, 9 Sup. Ct. Rep. 701.

Resignation of officer does not divest court of power to punish for contempt.—The Laurens, 1 Abb. (U. S.) 302, Fed. Cas. No. 8121.

In Ex parte Robinson, 86 U. S. (19 Wall.) 505, 22 L. Ed. 205, it was ruled that the power to disbar an attorney is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised when there has been such conduct on the part of the party complained of as shows him to be unfit to be a member of the profession; and before judgment disbaring him can be rendered, he should have notice of the grounds of complaint against him and opportunity of defense.

² See Freston, In re, 49 L. T. N. S. 290.

As to misconduct of counsel, see, *supra*, § 1513.

its representatives) to malpractice of attorneys, as in withholding papers or money from clients,³ and to clerks, masters, and referees, for any improper conduct or disobedience to the court.⁴

§ 1900. — AND SO AS TO OBSTRUCTION TO TRIAL. If obstruction to the rendering of testimony can only be punished by indictment, then even an indictment for such misconduct could, by continuance of the misconduct, be defeated, and no redress could be obtained. Hence, it is a contempt, punishable by commitment, for a witness not to attend when subpoenaed, or when under recognizance to attend;¹ for a witness, when attending, to refuse to be sworn;² for a witness, when sworn, to refuse to answer;³ for a third party to induce another to take a false oath;⁴

³ Smith, *Ex parte*, 28 Ind. 47; *People ex rel. Johnson v. Nevins*, 1 Hill (N. Y.) 154; Newberry, *In re*, 4 Ad. & E. 100, 31 Eng. C. L. 62; Willard, *Ex parte*, 2 J. Scott (11 C. B.) 544, 73 Eng. C. L. 543.

In North Carolina this has been held to apply to publications by attorneys derogatory to court.—Biggs, *Ex parte*, 64 N. C. 202; Moore, *Ex parte*, 64 N. C. 398.

⁴ Smith v. McLendon, 59 Ga. 523; *Yates v. People*, 6 Johns. (N. Y.) 337; *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *R. v. Harland*, 8 Dowl. P. C. 328.

¹ 1 Whart. Crim. Ev. (Hilton's ed.), § 349; Archbold's Cr. Pl. (17th ed.) 291; 2 Wait's Prac. (1873) 722; Conkling's Prac. (6th ed.) 410; Day's Common Law. Prac. (1872) 293, 311; Burr's Trial 354; Walker, *Ex parte*, 25 Ala. 81; Langdon, *Ex parte*, 25 Vt. 680; Judson, *Ex parte*, 3 Blatchf. 89, Fed. Cas. No. 7561; Peck, *Ex parte*, 3 Blatchf. 113, Fed. Cas. No. 10885; Judson, *Ex parte*, 3 Blatchf. 148, Fed. Cas.

No. 7563; Roelker, *Ex parte*, 1 Spr. 276, Fed. Cas. No. 11995.

In *Ellerbe, In re*, 4 McCr. 449, 13 Fed. 530, 4 Crim. Law Mag. 60, it was held that an arrest might be made by order of a district judge in any part of the United States besides that in which the suit was pending.

² *United States v. Coolidge*, 2 Gall. 364, Fed. Cas. No. 14858.

³ Day's Prac. (1872) 305, 311. MO.—*Renshaw, Ex parte*, 6 Mo. App. 474. N. Y.—*People ex rel. Hockley v. Kelly*, 24 N. Y. 74; *People v. Phelps*, 4 Thomp. & C. 467. TENN.—*Hirsch v. State*, 67 Tenn. (8 Baxt.) 89. TEX.—*Holman v. Austin*, 34 Tex. 668. FED.—*United States v. Caton*, 1 Cr. 150, Fed. Cas. No. 14758.

Applies to justices of the peace.—*Paley on Convictions* (1866) 329.

Otherwise as to notary public.—*Krieger, Ex parte*, 7 Mo. App. 367.

⁴ *Hull v. L'Eplattenier*, 49 How. Pr. (N. Y.) 500.

for a third party to endeavor to keep a witness from testifying,⁵ supposing such witness to have been subpoenaed;⁶ for a witness, when ordered to leave the court during the examination of other witnesses, to remain in;⁷ and for a party to obtain postponement by a false pretense of sickness.⁸ A justice of the peace, in some states, however, has no such power.⁹

§ 1901. — AND SO AS TO DISORDER IN THE PRESENCE OF COURT. If it be necessary to prevent disorder in court that an indictment should be tried against the offender, no indictment could be tried against the offender on account of the disorder in court. Hence any disturbance in court is punishable by attachment and commitment.¹ So it is an attachable contempt for an acquitted prisoner to swear vengeance on the prosecuting witnesses within the precincts of the court;² for a person to use insulting language to another in the hearing of the officers of the court, and in its presence;³ or to write an insulting letter to a grand jury as to their action;⁴ for the defendant to address the jury when ordered not to do so by the court;⁵ for persons in court to apply insulting language to the court, or, in presence of the court, to its process;⁶

⁵ *Infra*, § 1911; *Whittem v. State*, 36 Ind. 196; *Burke v. State*, 47 Ind. 528; *Haskett v. State*, 51 Ind. 176.

See 2 *Kerr's Whart. Crim. Law*, § 1597.

⁶ *McConnell v. State*, 46 Ind. 298.

⁷ *People v. Boscowitch*, 20 Cal. 436. See, *supra*, § 1499, note.

⁸ *Welch v. Barber*, 52 Conn. 147, 52 Am. Rep. 567.

⁹ *Rutherford v. Holmes*, 5 Hun (N. Y.) 317; affirmed, 66 N. Y. 368; *infra*, § 1909.

¹ *Archbold's Q. B. Prac.* (12th ed.) 1710; 6 *Robinson's Prac.* 698; *Smith, Ex parte*, 28 Ind. 47; *Redman v. State*, 28 Ind. 205; *Whittem*

v. State, 36 Ind. 196; *Com. v. Wilson*, 1 Phila. (Pa.) 83; *United States v. Emerson*, 4 Cr. 188, Fed. Cas. No. 15050.

² *United States v. Carter*, 3 Cr. 423, Fed. Cas. No. 14740. See *United States v. Patterson*, 26 Fed. 509.

³ *United States v. Emerson*, 4 Cr. 188, Fed. Cas. No. 15050.

⁴ *Tyler, Ex parte*, 64 Cal. 434, 1 Pac. 884.

⁵ *Tidd's Prac.* (Phil. 1856) 860.

⁶ *Daniell's Chan. Prac.* (1871) 387, note 1, 936. ILL.—*Hill v. Crandall*, 52 Ill. 70. IND.—*Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *Holman v. State*, 105 Ind. 513,

for persisting in performing military evolutions with music and firing of guns in the immediate neighborhood of the court during its session.⁷ But not so of an affray at a tavern where a judge was staying, the court not being in session.⁸ So it is a contempt to assault a judge, during a recess of the court, for words said or action taken by him when sitting as judge.⁹ But hasty language of counsel, not conveying direct insults to the court, will not be regarded as contempt.¹⁰

§ 1902. — AND SO AS TO MISCONDUCT OF, OR TAMPERING WITH, JURYMAN. From the necessities of the case, it is a contempt, punishable by commitment, for a jurymen to wilfully misconduct himself, when impaneled during the trial of a case, in such a way as to prevent a fair and decorous trial.¹ And it has been held to be a contempt of court to solicit a juror to give a signal after the jury have retired, to indicate whether they are likely to agree, so as to enable the party soliciting to make a successful bet on the question of agreement² or in any way to tamper with the jury.³ The same rule has been applied to sending vol-

5 N. E. 556. N. Y.—Robinson v. McElhane, 2 How. Pr. 454. ENG.—Wilson's Case, 7 Ad. & E. (7 Q. B.) 955; R. v. Davison, 1 Barn. & Ald. 329; Price v. Hutchinson, L. R. 9 Eq. 534.

Compare: Neel v. State, 9 Ark. 259, 50 Am. Dec. 209.

In New York, under Rev. Stat., such act, to be a contempt, must involve contemptuous behavior during session of court.—Bergh's Case, 16 Abb. Pr. N. S. (N. Y.) 266.

Expanded by § 143 of Penal Code of 1882.

⁷ State v. Goff, Wright (Ohio) 78; State v. Coulter, Wright (Ohio) 421.

⁸ Com. v. Stuart, 4 Va. (2 Va. Cas.) 329.

⁹ State v. Garland, 25 La. Ann. 532. See Com. v. Dandridge, 4 Va. (2 Va. Cas.) 405.

¹⁰ St. Clair v. Pratt, Wright (Ohio) 532; supra, § 1513.

¹ See, supra, §§ 1753-1777; State v. Helvenston, R. M. Charlt. (Ga.) 48; Offutt v. Parrott, 1 Cr. 154, Fed. Cas. No. 10453.

² State v. Doty, 32 N. J. L. (3 Vr.) 403, 90 Am. Dec. 671.

³ Supra, § 1664.

In State v. Blackwell, 10 S. C. 35, it was held that attempts to influence a jury, when made a statutory indictable offense, can not be punished summarily as a contempt.—See State v. Doty, 32 N. J. L. (3 Vr.) 956.

untrue information to a grand jury.⁴ It is also a contempt to attempt to induce an officer of the court to summon certain jurors in preference to others.⁵

III. WHEN THE CONTEMPT CAN BE SUPPRESSED OTHERWISE THAN BY COMMITMENT.

§ 1903. CRITICISMS ON CASE BEFORE COURT CONSTITUTE CONTEMPT. This brings us to what is called constructive contempt; embracing partisan publications or speeches on a litigated issue; whether consisting in comments on the case, or remarks reflecting on judge, jury, or parties.

By the English law, for proceedings such as these an attachment for contempt may issue. "It is a special contempt, punishable by the committal of the contemner, to misrepresent the proceedings of the court, to abuse the parties to the cause, or to attempt to prejudice the mind of the public against them before its cause is decided, or to publish anything, the evident result of which would be to affect the administration of justice."¹ Even

⁴ *Supra*, § 1295.

⁵ *Sinnott v. State*, 79 Tenn. (11 Lea) 281.

¹ *Dan. Chan. Pr.* 836. See *Buckley, In re*, 69 Cal. 1, 10 Pac. 69; *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426; *Henry v. Ellis*, 49 Iowa 205.

As sustaining this view we have an argument by Blackburn, J., delivered in 1873, in a conspicuous trial in the Queen's Bench. "Any case which is pending," said this learned judge (*R. v. Skipworth*, 12 Cox C. C. 377, 378), "when in a civil or criminal court, ought to be tried by the ordinary means of justice, and in the present case there is an indictment against one of the persons before us which is now standing for trial. That case ought to be fairly tried, but it may

happen that proceedings may occur such as have now called upon us to interfere. Sometimes the course is by attacking the judge; sometimes by attempting to induce him to alter his opinion, or to take a course different from that which he would otherwise take; more commonly, there is an attempt to influence the trial by attacking the witnesses or appealing to public justice, so as to prejudice the trial. In all these ways, great mischief may be done, interfering with the due and ordinary course of justice. When the attempt is by an act which is itself punishable, as conspiracy, libel, or assault, the party might, of course, be indicted for it; but the prosecution, though sufficient for the purpose of punishment, might be

a threat to publish papers calculated to prejudice a case on trial may be contempt.²

§ 1904. — AND SO AS TO OTHER PUBLICATIONS INTERFERING WITH DUE COURSE OF JUSTICE. In harmony with this view it has been held a contempt to publish *ex parte* extracts from evidence or pleadings;¹ and for a party

made greater (better?) for the purpose of prevention; the mischief might be done, and the administration of justice would be prevented or prejudiced. For that reason, from the earliest times, the superior courts of law and equity have exercised the jurisdiction of prosecuting such attempts by summary proceedings for contempt, and having that power, it is our duty, when the occasion comes, to exercise it." Hence, in a case closely related to that in which the opinion just quoted was delivered, after the Tichborne claimant, who had elected to be nonsuited in the ejectment brought by him to establish his right to the Tichborne estates, had been bound over for perjury, he united with some of his supporters in holding public meetings for the obtaining funds to support him in the trial for the latter offense. At these meetings, Messrs. Onslow and Whalley, members of parliament, made speeches imputing perjury and conspiracy to the witnesses for the defense on the trial of the ejectment, and prejudice and partiality to Chief Justice Cockburn, who they said had proved himself unfit to preside at the coming trial. The innocence of the claimant, and the injustice of the treatment to which he had been subjected, were also asserted. It was held by the Queen's Bench,

in January, 1873, that this was a contempt subjecting the defendants to fine and imprisonment, but the defendants, disclaiming contempt, were merely fined.—*R. v. Onslow*, 12 Cox C. C. 358. And see article in 2 London Law Mag. N. S. (1873) 164.

Hence, in the case in which the above opinion of Blackburn, J., was delivered, and in which was adduced language strongly vituperative of the chief justice, and charging him with premeditating injustice in the then approaching Tichborne trial for perjury, the offender, declining to purge himself of the contempt, was imprisoned as well as fined.—*R. v. Skipworth*, 12 Cox C. C. 371; 3 Kerr's Whart. Crim. Law, § 2213.

In *State v. Anderson*, 30 La. Ann. 557, 1 Southern Law Journal 183, an interesting opinion is given as to publication by federal officers as to a case depending in a state court.

² *Kitcat v. Sharp*, 48 L. T. N. S. 64.

In North Carolina it has even been held to be a contempt for an attorney to publish a paper charging the judge with indecent conduct in a political campaign.—*Moore*, In re, 63 N. C. 397.

¹ *Cheltenham etc. Railway Co.*, In re, L. R. 8 Eq. 580, in which case a petition in a suit for winding up a company, on ground of fraud,

to an issue in chancery to write to a master in chancery a grossly insulting letter in reference to the master's conduct in the case.² And the rule has been applied to publications out of court affecting not only questions to come before juries, but issues pending before judges sitting without juries.³ The same doctrine has been not infrequently held in the United States,⁴ though in most of the states statutes have been enacted divesting the courts of such power.⁵ But in any view, to justify a committal, it

was published by a newspaper before the hearing of the petition, and this was held by Vice-Chancellor Malins to be a contempt. But it is not a contempt publicly to solicit subscriptions for the defense of a defendant on a pending criminal charge.—*R. v. Skipworth*, 12 Cox C. C. 371.

² *Charlton's Case*, 2 My. & Cr. 316, 40 Eng. Repr. 661.

³ *Daw v. Eley*, L. R. 7 Eq. 47; *Tichborne v. Mostyn*, L. R. 7 Eq. 55; *Macartney v. Corry*, Irish R. 7 C. L. 242.

⁴ See 1 *Hawley's Cr. R.* 143. ARK.—*State v. Morrill*, 16 Ark. 384. ILL.—*Stuart v. People*, 4 Ill. (3 Scam.) 405. N. H.—*Tenny, Ex parte*, 23 N. H. (3 Fost.) 162; *State v. Matthews*, 37 N. H. 450; *Sturoc, Matter of*, 48 N. H. 428, 97 Am. Rep. 626. N. Y.—*People v. Freer*, 1 Cal. 518. N. C.—*Moore, In re*, 63 N. C. 397; *Biggs, Ex parte*, 64 N. C. 202. PA.—*Respublica v. Passmore*, 3 Yeates 441, 2 Am. Dec. 388. FED.—*Oswald's Case*, 1 U. S. (1 Dall.) 319, 1 L. Ed. 155; *Hollingsworth v. Duane*, Wall. 77, Fed. Cas. No. 6616; *United States v. Duane*, Wall. 102, Fed. Cas. No. 14997.

As disputing the power, see *Dunham v. State*, 6 Iowa 245; *Hickery, Ex parte*, 12 Miss. 751.

⁵ See *Poulson, Ex parte*, 15 Haz. Pa. Reg. 380.

In a remarkable case before the Supreme Court of Illinois, sitting in Ottawa, Illinois, in November, 1872, a majority of that court held that it was a contempt to publish in a Chicago newspaper an article which, in speaking of a criminal case then pending in error before that court, said that the defendant would be granted a new trial, sentenced to imprisonment, and then pardoned, "because the sum of \$1400 is enough, nowadays, to enable a man to purchase immunity from the consequences of any crime."—*People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528.

Able, however, as is the question argued by Lawrence, C. J., and by the majority of the court, and great as is the respect due to Lawrence, C. J., for the independent and bold stand taken by him in this and other points regarding the dignity of the judiciary, the conclusion reached can not be here accepted for the reasons stated in the text. In the same state, since the repeal of the statute defining the power, it has been held that the courts continue to hold the usual common law powers, but will not exercise them as

must plainly appear that the effect of the publication is to interfere with the due administration of justice.⁶

§ 1905. — BUT SUMMARY COMMITMENT ONLY TO BE USED WHEN NECESSARY. We should remember, however, that summary commitment is a process only to be used when no other remedy can protect public justice from obstruction.¹ For a judge, who supposes himself insulted, to fine and imprison his supposed insulter, may be necessary, as where the insult is in open court, and is of such a character that unless it is summarily stopped and punished the court can not proceed with its duties; but to enable a judge to punish by summary procedure contempts other than those just mentioned is to set at naught, without adequate reason, some of our highest constitutional sanctions. Such a process dispenses with a grand jury. It inflicts punishment without conviction of a petit jury. It permits the party who supposes himself to be injured to be the tribunal which binds over, finds the bill, decides both law and fact, convicts, and sentences. We are also told, though as will be seen erroneously, by those who advocate the prerogative to its full extent, that the process is subject neither to writ of error, nor to revision by habeas corpus, nor pardon.² But the prerogative rests on a vicious line of reasoning. The supposed contempt is such that the judge will or will not be intimidated or swerved by it in the discharge of his duty. If not, then there is no reason for such an extraordinary remedy. If otherwise, then for the judge to confess his weakness in this respect, and to make this confession in so conspicuous a way, is at least as injurious to public justice as is the publication in which the objectionable

to publications which do not obstruct courts in the exercise of their functions.—*Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158.

⁶ *Plating Co. v. Faquharson*, 44 L. T. (N. S.) 389.

¹ See *Hirst*, In re, 9 Phila. (Pa.) 216; *State v. Anderson*, 40 Iowa 207.

² See, *supra*, § 1467; *infra*, §§ 1920, 1946.

matter is contained. But there is another view beyond this. We can conceive not only of a weak judge who dreads intimidation, but of a corrupt judge who dreads exposure. To give a bad and bold man of this class an engine so potent as this, is to take away one of the few means by which he can be exposed. Certainly a prerogative so violent and so damaging should not be exercised except in case of necessity.³

§ 1906. IN CASES OF THIS CLASS AN ORDINARY PROSECUTION IS THE BETTER COURSE. But is such engine, in cases such as those we now contemplate, necessary? Would not a binding over for trial, or a binding over to keep the peace, in each of the above-mentioned cases, afford a sufficient remedy? Suppose the case to be one of such criticism on a pending case as is calculated to interfere with a due discharge by court or jury of their respective duties or to prevent, by fanning a public excitement on the subject, a fair trial. In such case the law of libel may be invoked; and by that law it is indictable not only to comment on a pending case, but to publish *ex parte* extracts from the record or evidence.¹ Our ordinary constitutional remedies are, therefore, sufficient to punish and silence such offenders. The defendant can be arrested and held to bail, or, in default of bail, committed to prison; and if the offense be repeated, and he be at large, the bail can be increased. Or suppose the offense to consist in attempts, out of court, to influence the jury. Here the offender is indictable for embracery, and can be arrested and bailed or committed for this offense.² Or

³ By Rev. Stat., § 725, "such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their (the courts') presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts, in their offi-

cial transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ," etc.

¹ See 3 Kerr's Whart. Crim. Law, §§ 1961 et seq.

² *Infra*, § 1912.

suppose the case to consist in slanderous words addressed to the court. If this is during a trial, then a commitment for contempt is necessary, for otherwise no trial, not even that for instituting criminal proceedings to prevent such misconduct, could go on. But if the slanderous language be not used during trial, nor in the court room or its approaches, then it can be sufficiently punished, and its repetition sufficiently guarded against, by an arrest and binding over for trial, or an arrest and binding over to keep the peace. For it is an indictable offense to address slanderous words to a magistrate;³ and independently of this, an offender of this class may be bound over to keep the peace, and placed under bonds sufficiently heavy, if not to compel good behavior, at least to incarcerate him as completely as if he were imprisoned for contempt. But a binding over to keep the peace has none of the distinctive objections by which commitments for contempt are beset. In such a binding over, the state is the prosecutor, and not the offended judge. The proceedings are not inquisitorial, as is the case with contempt, but the defendant meets the witnesses against him face to face. The writ of habeas corpus is open in such case as a remedy, while its application to commitments for contempt is contested where the committing court has jurisdiction.⁴ The remedy by binding over, while equally efficacious, is less harsh, and not likely to awaken that public sympathy which often, unconsciously, arises for one who is summarily punished by high prerogative.⁵ And while the common law process of binding over gives all due pro-

³ 2 Kerr's Whart. Crim. Law, § 1936.

⁴ See, *infra*, § 1946.

⁵ In *Re Clements* (36 L. T. Rep. N. S. 332), Sir George Jessel said: "This jurisdiction of committing for contempt, being practically arbitrary and unlimited, should be most jealously and carefully

watched, and exercised with the greatest anxiety on the part of the judge to see that there is no other more which is not open to the objection of arbitrariness, and, to a certain extent, unlimited power, which can be brought to bear upon the subject."

tection to the citizen, that of commitment for constructive contempt may be pleaded, as will presently be seen, as a precedent for incarceration, unrelievable by habeas corpus, of those whose criticisms may be deemed contemptuous by legislature if not by executive.

§ 1907. DANGER OF DEPOSITING SUCH POWER IN COURTS. It may well be asked why, if such an extreme remedy is necessary in case of the judiciary, is it not in case of the executive? The executive, in cases of application for pardon, exercises a semi-judicial function, in which, equally with the judge trying the case, it is important that he should be kept free from the influences of fear, favor, or affection. The executive, when dealing with great questions of war, or almost equally great questions of currency expansion or contraction, should be in an eminent degree superior to the clamor of ignorant or timid or fanatical declaimers, and to the false public sentiment generated by desperate speculators, and even to the true public sentiment generated by a real but baseless panic. Who, however, would consider it consistent with either law or liberty for the executive to summarily arrest and imprison, without the relief of bail, without the interposition of a responsible prosecutor, without examination of witnesses, without the right of subsequent revision by habeas corpus, those from whom such publications should issue? Or, to take an alternative still more applicable, is such a prerogative safely to be claimed for the legislature? The legislature is co-ordinate in power and dignity with the judiciary. The legislature, either federal or state, has no doubt power to punish summarily for contempts by which the exercise of its distinctive functions is physically impeded; but can we rightfully claim for the legislature power to commit summarily persons criticising, no matter how unfairly or corruptly, measures over which it is still deliberating? But if the exercise of such a power is not permitted to executive or

legislature, why should it be conceded to the judiciary? Or, if so conceded to the judiciary, why should we withdraw from the prerogative those general considerations of policy already noticed,¹ which, while retaining for libels common law prosecutions, invoke, in the institution of such prosecutions, peculiar caution, tenderness, and reserve? But however these questions may be determined, two points remain: First, the doctrine of constructive contempt is of recent introduction, not being part of the common law brought with them to this country by our colonists;² and, secondly, it is a violent remedy, justifiable

¹ 3 Kerr's Whart. Crim. Law, § 1932.

² No English case for constructive contempt is reported prior to the American Revolution. The earliest case in which the question arose was that of the printer Almon, proceeded against in 1765, for contempt of court, in publishing an attack on the chief justice, imputing improper and corrupt conduct in his office, and in whose case Sir E. Wilmot, one of the judges, prepared an elaborate judgment vindicating the punishment of the printer by fine and imprisonment—a judgment, however, never delivered, the proceedings being abandoned, and the publication of the proposed judgment, in Sir E. Wilmot's opinion, being, as is stated, without his sanction. So far as concerns inferior courts, the jurisdiction, as will presently be seen, is now expressly denied by the English Queen's Bench, and so far as concerns superior courts, it is justified by Cockburn, Ch. J., only on the fiction of the presence of the sovereign in such courts. "The power of committing for contempts committed in the face of the court is given to inferior

courts, but they had not power so to punish contempts committed out of court. There is an obvious distinction between inferior courts created by statute and superior courts of law or equity. In these superior courts the power is inherent in their constitution, has been coeval with their original institution, and has been always exercised. The origin can be traced to the time when all the courts arose as divisions of the curia regis—the supreme court of the sovereign, in which he personally, or by his immediate representative, sat to administer justice. The power of the courts in this respect was an emanation from the royal authority, which, when exercised personally, or in the presence of the sovereign, made a contempt of the crown punishable summarily, and hence the power passed to the superior courts when they were created. It is a very different thing when we come to the inferior courts, which have never exercised this power, or have never been recognized as possessing it, and we think in those courts it does not exist."—R. v. Lefroy, L. R. 8 Q. B. Div. 134, as

only in cases not reached by bindings over to keep the peace, or bindings over for trial.³

Where, however, the case is one in which summary proceedings for contempt afford a suitable redress, the jurisdiction is not ousted by the fact that the offense might be prosecuted by indictment or information.⁴

IV. BY WHOM SUCH COMMITMENT MAY BE ISSUED.

§ 1908. SUPERIOR COURTS HAVE POWER TO ISSUE COMMON-LAW COMMITMENTS. That superior courts have the usual common law power in this respect has been already seen. However this power may be limited, in courts of this class, when acting judicially it unquestionably resides.¹ It

stated in the London Times of February 1, 1873.

A late writer in *Notes and Queries* gives an interesting sketch of the early history of the offense: "In the collection of laws of Henry I it is called contemptus brevium, or contempt of the king's legal writs. At that time contempt of court was punished with a fine. A remarkable fact in connection with the subject is, that the method of the punishment has become more summary in the later times. In the reign of Henry II, mere disrespect or disturbance was not visited with immediate severity, but the offender was formally indicted. A case has come down to us in which one of the king's judges was insulted, and this method was pursued. The present process of attachment or arrest was only employed in cases where there had been disregard of the legal writs of the court. An early, although scarcely an authentic case of contempt of court, is afforded by the commitment of the Prince of Wales, by Chief Jus-

tice Gascoigne, in the reign of Henry IV."

As a point of special interest at the present time it may be remarked that efforts to influence jurors were never deemed contempt, but were indictable as a common law offense, known as "embracery of jurors."

³ As sustaining this view, but in marked conflict with other English cases, see *R. v. Gilham*, 1 M. & M. 165, 22 Eng. C. L. 469, where it was held by Little Dale and Gaselee, JJ., that it was not a contempt, which the judge could interfere to stop, to exhibit in an assize town an inflammatory publication respecting a crime about to be tried in the assizes.

⁴ See 5 Crim. Law Mag. 166; supra, § 1374; *Arnold v. Com.*, 80 Ky. 300, 44 Am. Rep. 480.

¹ See *People v. Phelps*, 4 Thomp. & C. (N. Y.) 467.

As to Connecticut, see *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650.

In *Robinson, Ex parte*, 86 U. S. (19 Wall.) 505, 22 L. Ed. 205, it

is otherwise as to courts when acting ministerially.²

§ 1909. OTHER COURTS LIMITED TO CONTEMPTS IN THEIR PRESENCE; PRACTICE AS TO COMMISSIONERS AND NOTARIES. Inferior courts, justices, and commissioners are limited, in the issue of summary commitments, to contempts committed in their presence, unless ampler powers be given them by the legislature.¹ Commissioners in the United States Circuit or Territorial courts have not, unless in cases where the statute gives that power to officers of this class, even the power to commit a non-answering witness for contempt. The process must be asked for from the

was held that the power is inherent in the courts of the United States; but that the Act of Congress of March 2, 1831, entitled "An Act Declaratory of the Law concerning Contempts of Court," limits the power of the Circuit and District Courts of the United States to three classes of cases: 1st. Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d. Where there has been misbehavior of any officer of the courts in his official transactions; and, 3d. Where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. It was further ruled that the 17th section of the Judiciary Act of 1789, in prescribing fine or imprisonment as the punishment which may be inflicted by the courts of the United States for contempts, operates as a limitation upon the manner in which their power in

this respect may be exercised, and is a negation of all other modes of punishment.

The legislature, while it can limit the exercise of this power, can not absolutely deprive the courts of its exercise. — *State v. Merrill*, 16 Ark. 384; *Millington, In re*, 24 Kan. 214; *Wolley, In re*, 74 Ky. (11 Bush) 95.

² See *Clark v. People*, 1 Ill. (Breese) 266; *Smith, Ex parte*, 28 Ind. 47; *Gorham v. Luckett*, 45 Ky. (6 B. Mon.) 638.

¹ CAL.—*Batchelder v. Moore*, 42 Cal. 412. CONN.—*Noyes v. Byrbee*, 45 Conn. 382. MASS.—*Clark v. May*, 68 Mass. (2 Gray) 410, 61 Am. Dec. 470; *Cartwright's Case*, 114 Mass. 230. N. J.—*Kerrigan, In re*, 33 N. J. L. (4 Vr.) 344. N. Y.—*Watson, In re*, 3 Lans. 408. S. C.—*State v. Applegate*, 2 McC. L. 110. TENN.—*State v. Galloway*, 45 Tenn. (5 Cold.) 326, 98 Am. Dec. 404. FED.—*Hollingsworth v. Duane*, Wall. 77, Fed. Cas. No. 6616. ENG.—*R. v. Lefroy*, L. R. 8 Q. B. Div. 134.

circuit or territorial judge;² though it has been held that commissioners may exercise the powers belonging to local justices of the peace.³ Nor has a notary public this power.⁴ When necessary under a commission in chancery procedure, the course is to apply to the court from whom the commission issues.⁵

In New York, by the Penal Code of 1884, sec. 143, disorderly conduct in presence of courts not of record, as well as of record, and in the presence of referees when acting under order of court, is made a criminal contempt.

In Pennsylvania, a justice of the peace, at common law, has not power to commit even for direct contempt. His course, if there be such contempt, is to remit the case to the proper court, in order to obtain the action of such court.⁶ A similar view is maintained in New Jersey, where the power is denied to a recorder of a city who is invested with the powers of a justice of the peace;⁷ and to a justice of the peace sitting for the trial of minor civil issues.⁸ In England, however, the right to commit

² Judson, *In re*, 3 Blatchf. 148, Fed. Cas. No. 7563.

At common law referees and commissioners have not the power unless by statute.—*La Fontaine v. Underwriters*, 83 N. C. 182; *Stewart v. Allen*, 45 Wis. 100.

³ *United States v. Schumann*, 2 Abb. N. S. 523, Fed. Cas. No. 16235. See *Doll*, *Ex parte*, 27 Leg. Int. 20, 11 Int. Rev. Rec. 36, 7 Phila. Rep. 595, Fed. Cas. No. 3968.

Compare: *Gordon*, *Ex parte*, 4 Cr. 572, Fed. Cas. No. 5628; *United States v. Rundlett*, 2 Curt. 41, Fed. Cas. No. 16208; *United States v. Horton*, 2 Dill. 94, Fed. Cas. No. 15393.

Commissioners of supreme court have no jurisdiction to arrest and punish for contempt.—*People v. Carrington*, 5 Utah 531, 17 Pac. 735.

⁴ *Rapalje on Contempts*, p. 10; *Burt v. Pyle*, 89 Ind. 398; *Kreiger*, *Ex parte*, 7 Mo. App. 367.

Contra: *Abel's Case*, 12 Kan. 451.

⁵ *Dan. Ch. Pr.* 1178 et seq.

⁶ *Brooker v. Com.*, 12 Serg. & R. (Pa.) 175; *Albright v. Lapp*, 26 Pa. St. 99, 67 Am. Dec. 402.

By statute (*Brightly*, 273) the power is given to justices in Allegheny County.

⁷ *Kerrigan*, *In re*, 33 N. J. L. (4 Vr.) 344.

⁸ *Rhinehart v. Lance*, 43 N. J. L. (14 Vr.) 317.

for contempts in facie curiæ is reserved to justices;⁹ and such is the practice in several of our own states.¹⁰

§ 1910. — So AS TO LEGISLATURES. It has been held that it is within the power of the houses of congress and of the state legislatures to commit for contempt, not only for disorder during their sessions, but for a refusal to testify in any inquiry they may institute.¹ That both

⁹ Paley on Convictions (1866) 329.

Have no such power at common law, when sitting singly, is argued with much acuteness by Depue, J., in *Rhinehart v. Lance*, 43 N. J. L. (14 Vr.) 317.

¹⁰ *Hill v. Crandall*, 52 Ill. 70; *Robb v. McDonald*, 29 Iowa 330, 4 Am. Rep. 211; *State v. Towle*, 42 N. H. 540; *Cooper*, in re, 32 Vt. 253.

In Alabama, neither police magistrates nor justices of the peace have the power to punish for contempt. — *State v. McDuffie*, 52 Ala. 4.

In Illinois, neither police magistrates nor justices have this power. — *Newton v. Locklin*, 77 Ill. 103.

As to New York, the power is said to exist in justices at common law. — *Cowen's Treatise*, § 1334. For this Mr. Cowen cites: *Mather v. Hood*, 8 John. (N. Y.) 44, and *Richmond v. Dayton*, 10 John. (N. Y.) 393, cases, however, which only go to the justices' right to convict of forcible entry, and to bind over for good behavior in cases of disorder. The right can now only be exercised in the cases specified by statute. — *People v. Webster*, 3 Park. Cr. Rep. (N. Y.) 503.

—The statute gives the power to justices in cases where witnesses

refuse to answer questions, and when there is a prior oath as to the materiality of the question. — *Rutherford v. Holmes*, 66 N. Y. 368, affirming 5 Hun (N. Y.) 317.

16 *Robinson's Pract.* 694; *Stewart v. Blaine*, 1 McArth. (D. C.) 453; *Nugent*, Ex parte, 4 Clark (Phila.) 107, 1 Am. L. J. 107; *Falvey*, in re, 7 Wis. 630; *Anderson v. Dunn*, 19 U. S. (6 Wheat.) 204, 5 L. Ed. 242.

A curious question, as to the right of the legislature to punish for contempt, arose in Pennsylvania in 1758. Dr. William Smith, provost of the University of Pennsylvania, gave great offense to the provincial assembly by taking part in the publication of a petition to the assembly which that body deemed libelous. He was committed for contempt, and this commitment was renewed by a succeeding assembly. The assembly, in the commitment, directed the sheriff to refuse to obey all writs of habeas corpus. An appeal was taken to England; and the law officers of the crown gave it as their opinion that though the paper in question was a libel, it could not be treated as a contempt by a legislature elected after its publication. It was further held that the direction to the sheriff not to obey a writ of habeas cor-

these functions reside in each of the houses of the British parliament can not be questioned.² But it is now held by the Supreme Court of the United States that the House of Representatives of the United States has no power to commit for contempt witnesses refusing to answer questions in inquiries instituted by it not connected with the election of its members or with impeachment procedure.³ The same reasoning applies to the legislatures of the particular states. And it is clear that in any view that the power of committal for contempt does not belong to inferior legislatures, such as town councils or town meetings.⁴ The remedy for disturbance in such case is binding over to keep the peace, or indictment for disturbing a meeting.

V. INDICTABILITY OF CONTEMPTS: EMBRACERY.¹

§ 1911. INTERFERENCE WITH PUBLIC JUSTICE INDICTABLE. It has been already noticed that attempts to interfere with the production of evidence in a case are indictable at common law.² It is also clear that all disorder in a court-

pus was unwarrantable. The latter points were affirmed by the privy council. See *Life of Rev. William Smith, D. D.*, by H. W. Smith, Phila., 1879, chs. xii, xiv.

See, on this topic, article in 21 *Cent. L. J.* 43.

² 1 *Kent Com.* 236; 1 *Story on Const.*, § 847; *People v. Keeler*, 89 *N. Y.* 463, 52 *Am. Rep.* 49, 2 *N. E.* 615; *Burdett v. Abbot*, 14 *East* 1-131, 104 *Eng. Repr.* 501-551; *Shaftsbury's Case*, 1 *Mod.* 144, 157, 86 *Eng. Repr.* 792, 799; *Crosby's Case*, 1 *Wils.* 188.

³ *Kilbourne v. Thompson*, 103 *U. S.* 168, 26 *L. Ed.* 377.

The reason given is that the omnipotence assigned to the British parliament, which creates the British constitution, can not be as-

signed to either congress or state legislatures in this country, which are creatures of the constitutions by which they are limited.

⁴ Thus it has been held in Massachusetts that an act of the legislature giving to municipal corporations power to punish for contempt is unconstitutional. — *Whitcomb's Case*, 120 *Mass.* 118, 21 *Am. Rep.* 502. See, also, *Maulsby, Ex parte*, 13 *Md.* 642.

¹ As to embracery and indictment therefor, see, *supra*, §§ 601 et seq.

² 2 *Kerr's Whart. Crim. Law*, § 1597; *People v. Mead*, 92 *N. Y.* 415, 1 *N. Y. Cr. Rep.* 417. See *Ellerbe, In re*, 4 *McCr.* 449, 13 *Fed.* 530, 4 *Crim. L. Mag.* 60, under *Federal Revised Statutes*, § 1014, 2

room, and all attempts, forcible or fraudulent, to interfere with or prevent the due course of public justice, are in like manner indictable. So, by the better opinion, is insolent, or abusive, or corrupt language addressed to a justice of the peace when in the execution of his office.³ Whether attempt to intimidate or cajole a judge is indictable has been doubted; though it is clearly ground, on reasoning already given, for a binding over to good behavior.

§ 1912. — So WITH EMBRACERY, OR IMPROPER INTERFERENCE WITH JURY. By the common law it is an indictable offense to approach jurymen for the purpose of intimidating or influencing them.¹ Under the title of embracery, such attempts have been treated as forming a substantive offense, independent of the question of success.² By a statute of the United States the offense has in the federal courts a specific penalty.³ And such misconduct is in any view a contempt.⁴

VI. PRACTICE.

§ 1913. IN CASES IN FACE OF COURT, RULE MAY BE MADE INSTANTLY RETURNABLE. When a contempt, punishable by summary commitment, takes place in the face of the court, the court may order a rule on the offender, return-

Fed. Stats. Ann., 1st ed., p. 321,
2 Fed. Stats. Ann., 2d ed., p. 654.

³ Supra, §§ 251, 1899; 3 Kerr's
Whart. Crim. Law, § 1938.

In *R. v. Lefroy*, L. R. 8 Q. B. Div. 134, Mellor, J., said, "that judges of inferior courts have protection by way of criminal information, in cases of imputations upon their character or conduct calculated to affect the administration of justice. And it was not thought necessary to give them greater power."

To same effect, see remarks of

Woodward, J., in *Albright v. Lapp*,
26 Pa. St. 99, 87 Am. Dec. 402.

¹ Thomp. & Mer. on Jur., § 364;
supra, §§ 113, 1264, 1309; Com. v.
Kauffman, 1 Phila. (Pa.) 534.

² Supra, §§ 601 et seq., 1295,
1664; 3 Kerr's Whart. Crim. Law,
§ 2215; 1 Hawk., b. 1., ch. 85;
Whart. Prec. 1022; *State v. Sales*,
2 Nev. 268.

³ Supra, § 1664.

⁴ *Gandy v. State*, 13 Neb. 445,
14 N. W. 143; *Harwell v. State*,
78 Tenn. (10 Lea) 544.

able instant, to show cause why he should not be committed; though sometimes the rule to show cause is dispensed with, and the offender simply required to purge himself or stand committed.¹ No evidence need in such case be taken,² the matter being within the judicial notice of the court.³ And in case of the offender absconding, the court may sentence him at any time during the term when he is brought back.⁴

§ 1914. — OTHERWISE AS TO CONTEMPTS NOT IN FACE OF COURT. For contempts not in *facie curiæ* a rule to show cause is necessary;¹ and affidavits must be produced² to prove the inculpatory facts, in all cases in which the proceeding is not based on a return of record by the proper officer.³ The defendant then, and not till then, is called upon to purge himself from the contempt.⁴

¹ See exhaustive article on procedure in case of criminal contempts, by the late Judge Seymour D. Thompson, in 5 *Crim. Law Mag.* 484.

² 4 *Bl. Com.* (Wend. ed.) 283 et seq.; *Smethurst, In re*, 2 *Sandf.* (N. Y.) 724; *Com. v. Snowden*, 1 *Brewst. (Pa.)* 218; *United States v. Wayne*, *Wall.* 134, *Fed. Cas.* No. 16654; *Durant v. Washington Co.*, 1 *Woolw.* 377, *Fed. Cas.* No. 4191.

³ *People v. Kelly*, 24 *N. Y.* 75.

⁴ See *Middlebrook v. State*, 43 *Conn.* 257, 21 *Am. Rep.* 650.

¹ Notice is essential. — *State v. Matthews*, 37 *N. H.* 450; *Somerset v. Lellers*, 7 *N. J. L.* (2 *Halst.*) 31; *Langdon, Ex parte*, 25 *Vt.* 680.

This question is elaborately discussed by Judge Thompson in 5 *Crim. Law Mag.* 490 et seq.

² *Davis, In re*, 81 *N. C.* 72; *State v. Blackwell*, 10 *S. C.* 35; *Judson, In re*, 3 *Blatchf.* 148, *Fed. Cas.* No. 7563.

See 5 *Crim. Law Mag.* 485.

Affidavit an essential prerequisite in some states.—*Batchelder v. Moore*, 42 *Cal.* 412; *Phillips v. Welch*, 13 *Nev.* 158.

³ *Wright, Ex parte*, 65 *Ind.* 504, 508; *State v. Ackerson*, 25 *N. J. L.* (1 *Dutch*) 209; *R. v. Elkins*, 4 *Burr.* 2129, 98 *Eng. Repr.* 110.

⁴ *CAL.*—*Batchelder v. Moore*, 42 *Cal.* 412. *IND.*—*Whitten v. State*, 36 *Ind.* 196; *McConnell v. State*, 46 *Ind.* 298; *Burke v. State*, 47 *Ind.* 528. *FED.*—*Stanwood v. Green*, 2 *Abb.* 184, *Fed. Cas.* No. 13301; *Judson, In re*, 3 *Blatchf.* 148, *Fed. Cas.* No. 7563; *Lee v. Chadwick*, 11 *Int. Rev. Rec.* 133, *Fed. Cas.* No. 2570; *Hollingsworth v. Duane*, *Wall.* 141, *Fed. Cas.* No. 6617. *ENG.*—*R. v. Lefroy*, *L. R.* 8 *Q. B.* Div. 134; *R. v. Onslow*, 12 *Cox C. C.* 358; *R. v. Skipworth*, 12 *Cox C. C.* 371.

See, also, 1 *Whart. Crim. Ev.* (Hilton's ed.), § 350.

Party accused entitled to be heard.—*State v. Judges*, 32 *La.*

§ 1915. **HEARING MAY BE INQUISITORIAL.** The process, in the hearing, on the question of purging, is inquisitorial, in so far that it calls upon the defendant to purge himself from the contempt. If disrespect is disavowed or apologized for, and reparation, in proper cases, made, then the punishment is mitigated, or made nominal, on payment of costs.¹ Evidence contradicting that of the party purging himself can not at common law be received, his answers being conclusive;² though he may in such evidence expose himself to an indictment for perjury.³ In equity process, however, the answers so made may be contested.

VII. PUNISHMENT.

§ 1916. **COURT MAY FINE AND IMPRISON.** Where, as in the case of a witness not attending through inadvertence, no contempt is intended, and the offense is purged, the court may sentence simply to payment of costs, and require recognizances for good behavior.¹ The court has power, however, as has been seen, to fine and imprison, and to imprison until the fine be paid;² and in case of attorneys, to strike their names from the roll, or

Ann. 1256; Kilgore, *Ex parte*, 3 Tex. App. 247.

¹ As illustrating the practice, see *McDermott v. State*, 10 N. J. L. (5 Halst.) 63; *People v. Few*, 2 John. (N. Y.) 290; *United States v. Scholfield*, 1 Cr. 130, Fed. Cas. No. 16230; *Davis v. Sherron*, 1 Cr. 287, Fed. Cas. No. 3652; *Beebee, Ex parte*, 2 Wall. Jr. 127, Fed. Cas. No. 1220; *R. v. Onslow*, 12 Cox C. C. 378.

² ILL.—*Buck v. Buck*, 60 Ill. 105. IND.—*Haskett v. State*, 51 Ind. 176. N. C.—*Biggs, Ex parte*, 64 N. C. 202. FED.—*Pitman, In re*, 1 Curt. 186, Fed. Cas. No. 11184. ENG.—*R. v. Vaughan*, 1 Dougl. 516, 99 Eng. Repr. 329.

Contra: *Henry v. Ellis*, 49 Iowa 205; *State v. Matthews*, 37 N. H. 450.

As to the rule of evidence, see *Bates' Case*, 55 N. H. 325; *United States v. Dodge*, 2 Gall. 313, Fed. Cas. No. 14975.

³ *United States v. Dodge*, 2 Gall. 313, Fed. Cas. No. 14975.

¹ *United States v. Caton*, 1 Cr. 150, Fed. Cas. No. 14758.

As to practice in respect to perjury, see *Brinkley v. Brinkley*, 47 N. H. 40; *Wells v. Com.*, 62 Va. (21 Gratt.) 500.

² *Crittenden, Ex parte*, 62 Cal. 534.

suspend them for a fixed period.³ No bail, after commitment, it has been said, can be received;⁴ but this must be qualified by the position that the court can order bail for good behavior as a substitute for commitment.⁵

§ 1917. COMMITMENT MUST BE FOR FIXED PERIOD. A commitment for contempt, when imposed as a punishment, must be for a fixed period; otherwise it is void. It is otherwise, however, when the commitment is to enforce a particular duty (e. g., to testify), in which case the imprisonment may be directed to continue until the duty be performed.¹

§ 1918. FINE GOES TO STATE. The fine goes to the state; not to any party injured.¹ But it seems that to the fine may be added the plaintiff's counsel fees and costs incurred in resistance of the application.²

VIII. CONVICTION NO BAR TO PROCEEDINGS.

§ 1919. CONTEMPT NOT BARRED BY OTHER PROCEDURE. Contempt is not barred by other procedure, based on injuries inflicted by the contemptuous act on third parties,¹

³ *Smith v. Matham*, 4 Dowl. & R. 738; *Stephens v. Hill*, 10 M. & W. 28. See, *supra*, § 1899.

⁴ *Kearney, Ex parte*, 20 U. S. (7 Wheat.) 38, 5 L. Ed. 211; but this rests on the limited appellate power of the U. S. Supreme Court.

⁵ *Magennis v. Parkhurst*, 4 N. J. Eq. (3 Gr.) 433; *People v. Bennett*, 4 Pal. (N. Y.) 282; *United States v. Caton*, 1 Cr. 150, Fed. Cas. No. 14758; *United States v. Atchison etc. R. Co.*, 16 Fed. 853; *Childerns v. Saxby*, 1 Vern. 207, 23 Eng. Repr. 417.

¹ *Supra*, §§ 111 et seq.; *Williamson's Case*, 26 Pa. St. 23; *Com. v. Small*, 26 Pa. St. 42.

¹ *Rhodes*, In re, 65 N. C. 518;

Mullee, In re, 7 Blatchf. 23, Fed. *Morris v. Whitehead*, 65 N. C. 637; Cas. No. 9911.

² *Doubleday v. Sherman*, 8 Blatchf. 45, Fed. Cas. No. 4020.

Under the federal statutes the court imposing a fine for contempt will not remit it, this being solely a matter belonging to the pardoning power, until the executive, on being appealed to, finally refuses to exercise jurisdiction over the matter.—*Mullee*, In re, 7 Blatchf. 23, Fed. Cas. No. 9911. See *Kearney, Ex parte*, 20 U. S. (7 Wheat.) 38, 5 L. Ed. 211; 3 Op. Atty.-Gen. 622; 4 Op. Atty.-Gen. 458; 5 Op. Atty.-Gen. 579.

¹ *Supra*, § 1874.

the reason being that the personal injury and the contempt having different juridical relations, each with a distinct penalty, have distinct punishments.²

IX. APPEAL, ERROR, AND PARDON.

§ 1920. WHEN ON RECORD, PROCESS MAY BE REVISED IN ERROR. From the high and extreme prerogative that commitment for contempt involves, it is right that when exercised by an inferior court it should be the subject of revision by a superior court, whenever the record can be removed or the issue in any way transferred, either in the way of appeal, or by writ of error. Such is the sound opinion;¹ though where there is no statutory mode of revisal, and the record does not show the facts, the attempt thus to review must necessarily fail.² Yet, where

² See *State v. Woodfin*, 27 N. C. (5 Ired. L.) 199, 42 Am. Dec. 161; *State v. Williams*, 2 Speers (S. C.) 26.

For case of modification of sentence, see *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650.

¹ CAL.—*Rowe*, Ex parte, 7 Cal. 175; *People v. O'Neill*, 47 Cal. 109. GA.—*Cabot v. Yarbrough*, 27 Ga. 476; *Howard v. Durand*, 36 Ga. 346, 91 Am. Dec. 767. ILL.—*Stuart v. People*, 4 Ill. (3 Scam.) 395. IND.—*Whittem v. State*, 36 Ind. 196. KY.—*Bickley v. Com.*, 25 Ky. (2 J. J. Marsh.) 572. MASS.—*Clark v. May*, 68 Mass. (2 Gray) 410, 61 Am. Dec. 470. MO.—*Jilz*, Ex parte, 64 Mo. 205, 27 Am. Rep. 218. NEB.—*Gandy v. State*, 13 Neb. 445, 14 N. W. 143. N. Y.—*Yates*, Ex parte, 6 Johns. 337; *Albany Bank v. Schermerhorn*, 9 Pal. 372, 38 Am. Dec. 551; *People v. Kelly*, 24 N. Y. 74; *Pitt v. Davison*, 37 N. Y. 235. N. C.—*Summers*, Ex parte, 27

N. C. (5 Ired. L.) 149. PA.—*Hummell*, In re, 9 Watts 416; *Com. v. Newton*, 1 Grant 453. TEX.—*Jordan v. State*, 14 Tex. 436. VT.—*Langdon*, Ex parte, 25 Vt. 680. VA.—*Stokely v. Com.*, 3 Va. (1 Va. Cas.) 330; *Baltimore & O. R. R. v. Wheeling*, 53 Va. (12 Gratt.) 40.

This view is ably vindicated in *Whittem v. State*, 36 Ind. 196, though see *Burke v. State*, 47 Ind. 528.

There is an appeal for abuse of discretion. See *Howard v. Durand*, 36 Ga. 346, 91 Am. Dec. 767.

—In *People v. O'Neill*, 47 Cal. 109, it was held that the action of the court below was always reversible for want of jurisdiction.

² See, for cases of this: *Gates v. McDaniel*, 4 Stew. & P. (Ala.) 69; *Maulsby*, Ex parte, 13 Md. 625; *Adams*, Ex parte, 25 Miss. 883, 59 Am. Dec. 234; *State v. Thurmond*, 37 Tex. 340; *Cooper*, In re, 32 Vt. 258; *Kearney*, Ex parte, 20 U. S. (7 Wheat.) 38, 5 L. Ed. 391.

there is no process of appeal, the inferior court may be restrained from proceeding by injunction or prohibition.³

§ 1921. **WHEN BY HABEAS CORPUS.** Commitments for contempt can not ordinarily be reviewed by a co-ordinate court on habeas corpus;¹ though it is held that a federal court may review on habeas corpus such a commitment by a state court, when in violation of a federal statute or constitutional sanction.²

§ 1922. **PARDON DOES NOT USUALLY RELEASE.** Pardon, it has been already noticed, has been held not to release from imprisonment for contempt, though the better opinion is to the contrary.¹ It should be added that the right to pardon and remit has been claimed, in contempts committed in the federal courts, by the President of the United States.²

³ *R. v. Lefroy*, L. R. 8 Q. B. Div. 134, cited fully, *supra*, § 1909, n.

¹ *State v. Seaton*, 61 Iowa 563, 16 N. W. 736; *Haines v. Haines*, 35 Mich. 138; *Shattuck v. State*, 51 Miss. 50, 24 Am. Rep. 624; *People v. Jacobs*, 66 N. Y. 8.

But see more fully, *infra*, § 1946.

² *Infra*, §§ 1926, 1936.

¹ *Supra*, § 1467.

² See remarks of Blatchford, J., in *Re Mullee*, 7 Blatchf. 25, Fed. Cas. No. 9911, and see *State v. Sauvinet*, 24 La. Ann. 119, 13 Am. Rep. 115. *Supra*, § 1467.

CHAPTER C.

HABEAS CORPUS.

- § 1923. Writ available at any stage of imprisonment.
- § 1924. Writ can not be suspended by President or governor.
- § 1925. State court can not discharge persons under federal arrest.
- § 1926. Federal courts may review state arrests.
- § 1927. Petition should state facts and be verified by affidavit.
- § 1928. May be applied for by next friend.
- § 1929. Writ to be directed to custodian, and to be served personally.
- § 1930. Notice to be given to prosecution.
- § 1931. Writ not granted when relator should be remanded.
- § 1932. Relator, if in custody, must be produced immediately in court; but sickness cause for delay.
- § 1933. Causes of detention must be returned.
- § 1934. Return must not be evasive.
- § 1935. Writ to be enforced by attachment.
- § 1936. Return may be controverted.
- § 1937. Discharge from defects of process; and so in cases of oppression.
- § 1938. Writ may test extradition process.
- § 1939. Writ may obtain redress from void sentence.
- § 1940. — But can not overhaul indictment, or matters within province of trial court.
- § 1941. Writ can not collaterally correct errors.
- § 1942. — Nor will hearing be interrupted.
- § 1943. Distinctive practice in cases in which there is no writ of error.
- § 1944. Military judgments can not be thus reviewed.
- § 1945. — Nor summary police convictions.
- § 1946. — Nor committals for contempt.
- § 1947. Court determines questions of fact.
- § 1948. Probable cause enough.
- § 1949. Evidence not excluded on technical grounds.
- § 1950. Remitting evidence and record by certiorari.

- § 1951. Affidavits may be received.
- § 1952. No discharge for technical defects or variance.
- § 1953. Discharge from pardon, or statute of limitations.
- § 1954. Discharge from want of probable cause; adjustment of bail.
- § 1955. Judgment must be discharge or remander.
- § 1956. During hearing custody is in court of writ.
- § 1957. Writ of error not permissible at common law; proceedings in error.
- § 1958. How far discharge affects subsequent apprehension.

§ 1923. WRIT AVAILABLE AT ANY STAGE OF IMPRISONMENT. The writ of habeas corpus, while the first, is also the last process to which an arrested person can resort for the purpose of having his case tested by a court of justice; and a brief summary of the law in this relation may not improperly close the present volume. The writ is one of the high prerogatives of the people as a sovereign, and its object is to enable any person within the territorial limits of the state, alien or subject, no matter what may be the disabilities or infamy under which he labors, to obtain at any period the judgment of a judicial tribunal as to the legality of an imprisonment in which he may be detained. The origin and history of the statute providing this writ, however, are beyond our present province; and it is equally out of our range to discuss the cases in which the writ may be used to obtain adjudications on the lawfulness of custody other than that imposed by criminal process. To the writ as a mode of obtaining relief from an arrest under a criminal charge our attention must be confined.¹

¹ The right is by common law.—*Le Besset, Ex parte*, 6 Ad. & E. N. S. (6 Q. B.) 481, 51 Eng. C. L. 480.

Lord Mansfield's speech in the House of Lords, June, 1758, is to the same effect.—*Campbell's Lives of Chief Justices*, vol. ii, p. 453.

Taney, C. J., in *Merryman's Case*, 1 Taney 246, Fed. Cas. No. 9487, also to same effect. This case is reviewed, with authorities, in 9 Am. Law Rep. 705.

Compare: *Pomeroy's Archbold's Cr. Pl. & Pr.* 190 et seq.; 22 Am. Law Rev. 149.

§ 1924. WRIT CAN NOT BE SUSPENDED BY PRESIDENT OR GOVERNOR. It is not within the constitutional power of the President of the United States to suspend the operation of the writ, or to authorize such suspension by a military officer. The prerogative of suspending the writ

Actual restraint of liberty essential; prisoner must be in involuntary custody, is the general, but not the universal holding of the courts. D. C.—Wales, In re, 4 Mock. 38. GA.—Lark v. State, 55 Ga. 435 (sentence to "work on chain gang" does not deprive of "liberty" and entitle to writ). MONT.—O'Brien, In re, 29 Mont. 530, 75 Pac. 196. OKLA.—Dykes, In re, 13 Okla. 339, 74 Pac. 506. PA.—Com. v. Doran, 15 Pa. Co. Ct. Rep. 385. TEX.—Cole, Ex parte, 14 Tex. App. 579; Patterson, Ex parte, 56 S. W. 912; Chestnutt, Ex parte, 39 Tex. Cr. Rep. 624, 47 S. W. 649. UTAH—Meeers, Ex parte, 3 Utah 50, 5 Pac. 552. FED.—Wales v. Whitney, 114 U. S. 564, 29 L. Ed. 277, 5 Sup. Ct. Rep. 1050; Wilson v. Marshall, 1 Cr. 608, Fed. Cas. No. 17822.

Compare: Mackenzie v. Barrett, 73 C. C. A. 280, 141 Fed. 964.

Person deprived of privilege of going when and where he pleases, is "restrained of his liberty," and entitled to the writ.—Com. v. Ridgway, 2 Ashm. (Pa.) 247.

Discharge on bail person not entitled to writ, the all but universal rule. KAN.—Territory v. Cutler, 1 Kan. 565. MISS.—Walker, In re, 53 Miss. 366; Caples, In re, 58 Miss. 358. NEB.—Spring v. Dahlgman, 34 Neb. 692, 52 N. W. 567. N. J.—Ryan v. State, 7 N. J. Law Journal 308. N. Y.—Lampert, Ex parte, 21 Hun 154. PA.—Com. v.

Gill, 10 Pa. Co. Ct. Rep. 71; Com. v. Connell, 13 Pa. Co. Ct. Rep. 103; Com. v. Sheriff, 2 Pa. Dist. Rep. 319; Com. v. Gill, 48 Leg. Int. 34. S. C.—State v. Buyck, 2 Bay L. 563; State v. Buyck, 1 Brev. L. 460; Logan v. State, 3 Brev. L. 415; Logan v. State, 2 Tread. Const. 493.

Compare: Mackenzie v. Barrett, 73 C. C. A. 280, 141 Fed. 964.

Refusal to accept unconditional pardon prisoner not entitled to writ of habeas corpus.—Callicot, In re, 8 Blatchf. 89, Fed. Cas. No. 2323.

Voluntary surrender by prisoner or collusive surrender by bailsmen to confer jurisdiction, will not entitle to writ: CAL.—Grow, In re, 139 Cal. 242, 73 Pac. 145. KAN.—Dill, In re, 11 Pac. 672. OKLA.—Dykes, In re, 13 Okla. 339, 74 Pac. 506. PA.—Com. v. Green, 185 Pa. St. 641, 40 Atl. 96; State v. Fencicle, 20 Pa. Co. Ct. Rep. 68. TEX.—Lawrence, Ex parte, 45 Tex. Cr. Rep. 521, 78 S. W. 346. FED.—Baker v. Grice, 169 U. S. 284, 42 L. Ed. 748, 18 Sup. Ct. Rep. 328, reversing Grice, In re, 79 Fed. 627.

Surrender of a person indicted, by his bailsmen, at his request, and his consequent imprisonment, furnish no ground for interference by habeas corpus.—Baker v. Grice, 169 U. S. 284, 42 L. Ed. 784, 18 Sup. Ct. Rep. 323, reversing In re Grice, 79 Fed. 627.

belongs exclusively to congress.¹ Nor is this function

¹ *Griffin v. Wilcox*, 21 Ind. 370; *Dunn, In re*, 25 How. Pr. (N. Y.) 467; *Benedict, In re*, Hall, J., Pamph. N. Y. 1862; *Kemp v. State*, 16 Wis. 359; *McCall v. McDowell*, 1 Abb. (U. S.) 212, Fed. Cas. No. 8673; *Field, Ex parte*, 5 Blatchf. 63, Fed. Cas. No. 4761; *Merryman, Ex parte*, Taney 246, Fed. Cas. No. 9487; *McQuillon, Ex parte*, 3 West. L. Month. 440, 9 Pitts. L. J. 27, Fed. Cas. No. 8924.

Suspension in any view is not affected by an order of the war department.—*Field, Ex parte*, 5 Blatchf. C. C. 63, Fed. Cas. No. 4761.

Writ is not barred, though proceedings on it are stayed by the suspension.—See *Milligan, Ex parte*, 71 U. S. (4 Wall.) 2, 18 L. Ed. 281.

On the topic in the text the following pamphlets may be consulted:

(1.) *The Opinion of U. S. Atty.-Gen. on Suspension of the Writ of Habeas Corpus*. Wash., 1861.

(2.) *Habeas Corpus and Martial Law*. By Joel Parker, 1861. Judge Parker here argues that in times of war, "whether foreign or domestic, there may be justifiable refusals to obey the command of the writ, without any act of Congress, or any order or authorization of the President, or any state legislation for that purpose." This, however, does not arise from the President's power to suspend the writ, which he can not constitutionally do, but from the co-ordinate jurisdiction of the military authorities.

(3.) *The Privilege of the Writ* Crim. Proc.—148

of Habeas Corpus under the Constitution. By Horace Binney. Second edition. Philadelphia: C. Sherman & Son, 1862. In this pamphlet Mr. Binney holds that there is nothing in the constitutional clause "which either directly or by any fair or reasonable implication gives or confines this authority (that of suspension of the writ) to Congress, or takes it from the executive" (p. 31); and an elaborate reply is attempted to Chief Justice Taney's opinion in *Merryman's case*. A "second part" to the same pamphlet was published by Mr. Binney in the same year, the object of this publication being to "confront a doctrine of certain writers that the habeas corpus clause in the Constitution does not give power to anybody to suspend the privilege of the writ, but is only restrictive of the otherwise plenary power of Congress." This pamphlet is a reply to the answers which Mr. Binney's first pamphlet drew forth.

(4.) *The Law of War and Confiscation*. By S. S. Nicholas. Louisville, 1862.

(5.) *Review of Binney on the Habeas Corpus*. By J. C. Bullitt. Philadelphia, 1862.

(6.) *Remarks on Mr. Binney's Treatise*. By George M. Wharton. Philadelphia, 1862.

(7.) *Reply by Mr. Wharton to Mr. Binney's Criticisms*. In these pamphlets the position that the President has no right, on his own motion, to suspend the writ, is sustained with great force. It is not, at the same time, claimed that a return by a military officer in time of war, that the relator is in mili-

tary custody, is not a sufficient discharge.

(8.) *Personal Liberty and Martial Law*. Philadelphia, 1862. By Edward Ingersoll.

(9.) *Habeas Corpus*. By D. A. Mahoney, Prisoner of State, 1863.

(10.) *The Suspending Power and the Writ of Habeas Corpus*. By James F. Johnson. Philadelphia, 1862.

(11.) *Martial Law: What is it, and who can declare it?* By Tatlow Jackson. Philadelphia, 1862.

(12.) *Authorities Cited Antagonistic to Mr. Binney's Conclusions*. By Tatlow Jackson. Philadelphia, 1862.

(13.) *Judge Curtis on Executive Power*; reprinted 2 Curtis' Works 309. Compare 1 Curtis' Life 240, 349.

(14.) *Judge Leavitt's Decision in Vallandigham's Case*. Pamph. Philadelphia, 1863.

(15.) *Opinions of Founders of Republic on Habeas Corpus, etc.* Washington, 1864.

(16.) *Facts and Authorities on the Suspension of the Writ of Habeas Corpus*, 1864. Anon.

The following conclusions may now be ventured on the topics discussed in the foregoing publications:

First. The President of the United States has no constitutional power to suspend the writ of habeas corpus.

Second. On the return by a general military officer, in time of war, that he holds the relator either as a military subordinate, or as a spy, or as a deserter, or as a prisoner of war, an attachment should be refused.—*Infra*, § 1941.

Third. When a person, not in military service, or a prisoner of

war, or charged with being a spy or deserter, is arrested by any authority whatsoever, he should be discharged by a federal judge on habeas corpus, unless there is evidence produced against him at the hearing sufficient to justify an indictment to be found against him by a grand jury.—See *Milligan, Ex parte*, 71 U. S. (4 Wall.) 2, 18 L. Ed. 281.

Fourth. If the return be that the relator is held under federal authority, the revision by a writ of habeas corpus is vested exclusively in the federal courts.—*Infra*, §§ 1925, 1935.

According to Judge Curtis, "Military law is that system of laws enacted by the legislative power for the government of the army and navy of the United States, and of the militia when called into the actual service of the United States. It has no control whatever over any person or any property of any citizen. It could not even apply to the teamsters of an army save by force of express provisions of the laws of Congress making such persons amenable thereto. The persons and property of private citizens of the United States are as absolutely exempted from the control of military law as they are exempted from the control of the laws of Great Britain. But there is also martial law. What is this? It is the will of a military commander operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition of all over whom this law extends. . . . In time of war, without any special legislation, not the commander-in-chief only, but every commander of an

vested in the governor of a state, under a constitution giving the governor power to suppress insurrections.²

§ 1925. STATE COURT CAN NOT DISCHARGE PERSON UNDER FEDERAL ARREST. The writ can not be used by a state court for the purpose of revising arrests under federal process.¹

expedition or of a military post, is lawfully empowered by the Constitution and laws of the United States to do whatsoever is necessary to accomplish the lawful objects of his command. . . . But when the military commander controls the persons or property of citizens who are beyond the sphere of his actual operations in the field, when he makes laws to govern their conduct, he becomes a legislator. . . . He has no more lawful authority to hold all the citizens of the entire country, outside of the sphere of his actual operations in the field, amenable to his military edicts, than he has to hold all the property of the country subject to his military requisitions."—2 Curtis' Life and Works 327.

Compare authorities cited in Lawrence's Wheaton 516-520, as to distinction between martial and military law, and the right to suspend the writ of habeas corpus.

Between martial law and military law the distinction is this: Martial law is the law adopted by civilized belligerents in matters connected with army discipline; military law is the law a conqueror imposes in a subjugated province, to determine matters of state.—See Whart. Com. Am. Law, §§ 37, 38; Mason, *Ex parte*, 105 U. S. 696, 26 L. Ed. 1213; Waters v. Campbell, 5 Sawy. 17, Fed. Cas. No. 17265; *infra*, § 1924.

Mr. Sumner, in his speech of June 27, 1862, took the ground that the power of Congress in this relation was supreme.

² Moore, *Ex parte*, 64 N. C. 802.

As to restoration of writ by proclamation, see Martin, *In re*, 45 Barb. (N. Y.) 142.

¹ ALA.—Kelly, *Ex parte*, 37 Ala. 474; Hill v. Confederate States, 38 Ala. 439, 471. CAL.—Le Bur, 49 Cal. 162. GA.—State v. Plime, U. T. P. Charlt. 142; Mims v. Wimberly, 33 Ga. 596. IOWA.—Holman, *Ex parte*, 28 Iowa 133. MICH.—Spangler, *In re*, 11 Mich. 298. MO.—Copenhaver, *In re*, 118 Mo. 383, 40 Am. St. Rep. 384, 24 S. W. 162. NEV.—Hill, *Ex parte*, 5 Nev. 154. N. J.—State v. Zalich, 29 N. J. L. (5 Dutch.) 409. N. Y.—Ferguson, *In re*, 9 Johns. 239. FED.—Ableman v. Booth, 62 U. S. (21 How.) 506, 16 L. Ed. 169, discussed in Church on Habeas Corpus, § 83; Tarble, *In re*, 80 U. S. (13 Wall.) 397, 20 L. Ed. 597, reversing 25 Wis. 390, 3 Am. Rep. 85; Farrand, *In re*, 1 Abb. C. C. 140, Fed. Cas. No. 4678; Neill, *In re*, 8 Blatchf. 166, Fed. Cas. No. 10089; Macdonnell, *In re*, 11 Blatchf. 193, Fed. Cas. No. 8773; Farrand v. Fowler, 2 Am. L. T. (U. S. Ct.) 4, Fed. Cas. No. 4678; Robb, *In re*, 9 Sawy. 582, 19 Fed. 32; Neagle, *In re*, 14 Sawy. 246, 5 L. R. A. 84, 39 Fed. 843; Johnson, *In re*, 46 Fed. 480.

State courts may determine

Hence, it is the duty of a federal marshal, in whose custody may be a person arrested under federal process, to refuse obedience to any writ commanding him to bring

whether apprehension and detention legal, has been held in some cases.—See: IOWA—Anderson, *Ex parte*, 16 Iowa 597. MASS.—Com. v. Downes, 41 Mass. (24 Pick.) 227; Sims, *In re*, 61 Mass. (7 Cush.) 285. N. H.—State v. Dimick, 12 N. H. 194, 37 Am. Dec. 197. N. Y.—Barrett, *In re*, 42 Barb. 479, 25 How. Pr. 380. OHIO—Collier, *In re*, 6 Ohio St. 55; Bushnell, *Ex parte*, 9 Ohio St. 78. PA.—Com. v. Fox, 7 Pa. St. 336; Dougherty v. Biddle, Bright. 4; Lockington, *In re*, Bright. 269; Com. v. Wright, 3 Grant's Cas. 437; Com. v. Grane, 3 Grant's Cas. 447; Tarble, *In re*, 25 Wis. 398, 3 Am. Rep. 89; overruled 80 U. S. (13 Wall.) 397, 20 L. Ed. 597, as noted above.

—In New York the jurisdiction is maintained in *People v. Gaul*, 44 Barb. (N. Y.) 98, 106; *Martin*, *In re*, 45 Barb. (N. Y.) 142, 31 How. Pr. (N. Y.) 228; *Webb*, *In re*, 24 How. Pr. (N. Y.) 247; *Bennett*, *In re*, 25 How. Pr. (N. Y.) 149.

But this is denied in *Hobson*, *In re*, 40 Barb. (N. Y.) 62; *O'Connell*, *In re*, 48 Barb. (N. Y.) 259; *People v. Fiske*, 45 How. Pr. (N. Y.) 294.

Concurrent jurisdiction is asserted in some cases.—See *Ohio etc. R. Co. v. Fitch*, 20 Ind. 505; *McRoberts*, *Ex parte*, 16 Iowa 600; *Holman*, *Ex parte*, 28 Iowa 89; *McConologue*, *In re*, 107 Mass. 172, 9 Am. Rep. 22.

—In the *McConologue Case*, supra, which was decided before the *Tarble Case*, above noted from Wisconsin, it is stated by the reporter that the Massachusetts

practice now conforms to the rule in *Tarble's Case*, ousting the state courts of their jurisdiction. The same course was taken in New York in *Macdonnell's Case* in 1873 (11 Blatchf. 79, Fed. Cas. No. 8771); *People v. Fiske*, 45 How. Pr. (N. Y.) 294.

For a discussion of this topic, see 1 Kerr's Whart. Crim. Law, § 308.

The relation of federal and state courts as co-ordinate powers is discussed supra, §§ 1371 et seq., and more fully in 1 Kerr's Whart. Crim. Law, §§ 305, 329, 333 et seq.

In *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676, where the relator, a state judge of Virginia, was indicted for excluding colored citizens from a jury on account of race, color, and previous condition of servitude, his petition for a writ of habeas corpus was denied. The relator argued that his act was judicial under state laws, and not amenable to the federal jurisdiction or laws. The court held that the act providing for the punishment of officers who exclude citizens from the jury on account of race or color is constitutional; that relator's act in selecting jurors was ministerial and not judicial; and that although he derived his authority from the state, he was bound, in the discharge of his duties, to obey the federal Constitution and laws. Mr. Justice Strong delivered the prevailing opinion; Mr. Justice Clifford and Mr. Justice Field, dissenting.—21 Alb. L. J. 182.

the prisoner before a state court; and he is authorized to call to his aid any force necessary for this purpose.² At the same time, in order to justify a refusal of an attachment on this ground, it must appear on the return that the prisoner is held under an arrest duly authorized by the proper federal authority. But the mere fact that a party is arrested ostensibly under the Constitution and laws of the United States—e. g., as in cases of interstate fugitives—does not necessarily oust the jurisdiction of the state courts when the prisoner is found in such jurisdiction.³

§ 1926. FEDERAL COURTS MAY REVIEW STATE ARRESTS. On the other hand, the writ may issue from a federal court to relieve a person under arrest by process from a state court or a state magistrate, when such arrest is in alleged violation of the constitution or laws of the United States.¹

² *Ableman v. Booth*, 62 U. S. (21 How.) 506, 16 L. Ed. 169, discussed in *Church on Habeas Corpus*, § 83; *Tarble, In re*, 80 U. S. (13 Wall.) 397, 20 L. Ed. 597, overruling 25 Wis. 390, 3 Am. Rep. 85; *Norris v. Newton*, 5 McL. 92, Fed. Cas. No. 10307; *Robinson, Ex parte*, 6 McL. 355, Fed. Cas. No. 11935.

³ *Robb v. Connelly*, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542; *supra*, § 73.

¹ *Royall, Ex parte*, 117 U. S. 241, 29 L. Ed. 868, 6 Sup. Ct. Rep. 734; *Royall, Ex parte*, 117 U. S. 254, 29 L. Ed. 872, 6 Sup. Ct. Rep. 742; *Farrand, In re*, 1 Abb. (U. S.) 140, Fed. Cas. No. 4678; *United States v. Jaller of Fayette Co.*, 2 Abb. (U. S.) 265, Fed. Cas. No. 15463; *Thompson, Ex parte*, 1 Flipp. 507, Fed. Cas. No. 13934; *McCready, Ex parte*, 1 Hughes 598, Fed. Cas. No. 8732; *Brosnahan, Matter of*,

4 McCr. 1, 18 Fed. 62; *Ho Ah Kow v. Numan*, 5 Sawy. 552, Fed. Cas. No. 6546; *Wong Yung Quy, In re*, 6 Sawy. 237, 47 Fed. 717; *Parrott's Chinese Case*, 6 Sawy. C. C. 376, 1 Fed. 481; *Ah Lee, In re*, 6 Sawy. 410, 5 Fed. 899; *Lee Tong, In re* (Oregon Dist. Ct.), 5 Crim. Law Mag. 67 (the last three being cases of alleged imprisonment "without due process of law" in contravention of the 14th amendment); *Neagle, In re*, 14 Sawy. 246, 5 L. R. A. 84, 39 Fed. 843; *Jenkins, Ex parte*, 2 Wall. Jr. 521, Fed. Cas. No. 7259; *Bridges, Ex parte*, 2 Woods 428, Fed. Cas. No. 1862; *Sifford, Ex parte*, 5 Am. L. Reg. 659, Fed. Cas. No. 12848; *Hanson, Ex parte*, 28 Fed. 127. See note in 23 Cent. L. J. 15.

Habeas corpus in federal court by prisoner out on bail on appeal to the United States Supreme Court, to test validity of arrest to answer state indictment, is not

It has also been held that a federal judge may release on habeas corpus a person committed by a state court for contempt in disobeying its orders, when such orders are in contravention of the federal constitution and statutes.²

permissible. — *Marrin, Ex parte*, 164 Fed. 635.

In *Spink's Case*, 19 Fed. 631, it was held that the writ could issue to relieve pilots from arrest. See *Buell, In re*, 3 Dill. 116, Fed. Cas. No. 2102; *Kenyon, Ex parte*, 5 Dill. 385, Fed. Cas. No. 7720.

Similar adjudications were made by federal judges releasing parties imprisoned under state laws for executing the federal fugitive slave law statute. Among these cases may be noticed *Charge of Nelson, J., in Fote v. Silsby*, 1 Blatchf. 445, Fed. Cas. No. 4916; *Robinson, Ex parte*, 1 Bond 39, Fed. Cas. No. 11934; *Robinson, Ex parte*, 6 McL. 365, Fed. Cas. No. 8016; *Peter, In re*, 2 Paine 348, Fed. Cas. No. 9154; *Jenkins, Ex parte*, 2 Wall. Jr. 521, 539, Fed. Cas. No. 7259; *Sifford, Ex parte*, 5 Am. Law Reg. O. S. 659, Fed. Cas. No. 12848.

See analysis of cases in *Church on Habeas Corpus*, § 78.

In *Re Wong Yung Guy*, 6 Sawy. 237, 47 Fed. 717, it was held that a federal court may, upon habeas corpus, inquire into the validity of a judgment of a state court, where in the petition it is alleged that the judgment, by virtue of which the relator is held in custody, rests upon an act of the legislature passed in violation of the provisions of the federal Constitution or of a treaty of the United States. See *Quong Woo, In re*, 7 Sawy. 526, 13 Fed. 229.

In *Clarke, Ex parte*, 100 U. S. 399, 25 L. Ed. 715, *Beasley, J.*, said:

"A justice of this court can exercise the power of issuing the writ of habeas corpus in any part of the United States where he happens to be. But as the case is one of which this court also has jurisdiction, if the justice who issued the writ found the questions involved to be of great moment and difficulty, and could postpone the case here for the consideration of the whole court without injury to the petitioner, we see no good reason why he should not have taken this course, as he did. It had merely the effect of making the application for a discharge one addressed to the court, instead of one addressed to a single justice." See *Kaine's Case*, 55 U. S. (14 How.) 103, 14 L. Ed. 345. "Of course, under our system, no justice will needlessly refer a case to the court when he can decide it satisfactorily to himself, and will not do so in any case in which injury will be thereby incurred by the petitioner. No injury can be complained of in this case, since the petitioner was allowed to go at large on reasonable bail."

The right is not affected by a prior habeas corpus issued from a state court.—*Leary's Case*, 6 Abb. (N. Y.) N. C. 43, 10 Ben. 197, Fed. Cas. No. 8162.

² *Electoral College, In re*, 1 Hughes 571, Fed. Cas. No. 4336; *Turner, Ex parte*, 3 Woods 603, Fed. Cas. No. 14246; *Spink, In re*, 19 Fed. 631, and cases, *infra*, § 1946.

Whether a federal judge will discharge a party under arrest under state process, on ground of conflict of such process with the federal constitution, is a matter of discretion which will not be exercised when there is an opportunity, after conviction, to take a writ of error to the state court, and then to the Supreme Court of the United States.³ But for a matter relating solely to state jurisdiction, the federal courts have no power of review through this writ;⁴ and, as a general rule, writ of error and not habeas corpus is the proper process to determine the question how far a prosecution in a state court is in conflict with the federal constitution.⁵ In any view, the petitioner's guilt or innocence of charges, of which a state court has jurisdiction, can not be considered on a habeas corpus issued by a federal judge.⁶

§ 1927. PETITION SHOULD STATE FACTS AND BE VERIFIED BY AFFIDAVIT. The petition should state the facts on

As to habeas corpus in United States courts, see note by Judge Thompson, 18 Fed. 70; and see 2 Kan. L. J. 223; 20 Cent. L. J. 169.

³ See *Hung Hang*, Ex parte, 108 U. S. 552, 27 L. Ed. 811, 2 Sup. Ct. Rep. 863; *Royall*, Ex parte, 117 U. S. 241, 29 L. Ed. 868, 6 Sup. Ct. Rep. 734; *Royall*, Ex parte, 117 U. S. 254, 29 L. Ed. 872, 6 Sup. Ct. Rep. 742; *Fonda*, Ex parte, 117 U. S. 516, 29 L. Ed. 994, 6 Sup. Ct. Rep. 848; *Coy*, In re, 127 U. S. 731, 32 L. Ed. 274, 8 Sup. Ct. Rep. 1263.

As to writ of error in such cases, see, *infra*, § 1957.

⁴ *Dorr*, Ex parte, 44 U. S. (3 How.) 103, 11 L. Ed. 514; *De Kraft v. Barney*, 67 U. S. (2 Black) 704, 17 L. Ed. 350; *United States v. French*, 1 Gall. 1, Fed. Cas. No. 15165; *United States v. Kinney*, 3 Hughes 9, Fed. Cas. No. 11720;

Reynolds, Ex parte, 3 Hughes 559, Fed. Cas. No. 7825; *United States v. Rector*, 5 McL. 174, Fed. Cas. No. 16132.

⁵ *Infra*, §§ 1940, 1943; *Virginia*, Ex parte, 100 U. S. 339, 25 L. Ed. 676; *Clarke*, Ex parte, 100 U. S. 399, 25 L. Ed. 715; *Siebold*, Ex parte, 110 U. S. 371, 25 L. Ed. 717; *Royall*, Ex parte, 117 U. S. 241, 29 L. Ed. 868, 6 Sup. Ct. Rep. 734; *Royall*, Ex parte, 117 U. S. 254, 29 L. Ed. 872, 6 Sup. Ct. Rep. 742; *Fonda*, Ex parte, 117 U. S. 516, 29 L. Ed. 994, 6 Sup. Ct. Rep. 848; *Coy*, In re, 127 U. S. 731, 32 L. Ed. 274, 8 Sup. Ct. Rep. 1263; *McKean*, Ex parte, 3 Hughes 23, Fed. Cas. No. 8848; *Wong Yung Quy*, In re, 6 Sawy. 237, 47 Fed. 717.

⁶ *Siebold*, Ex parte, 100 U. S. 371, 25 L. Ed. 717; *Crouch*, Ex parte, 112 U. S. 178, 28 L. Ed. 690, 5 Sup. Ct. Rep. 96.

which the charge of illegal restraint rests;¹ and, when the object is to attack a particular commitment, should give a copy of such commitment.² If the object be to discharge on bail, this object should be stated.³ The facts of the petition are usually verified by affidavit;⁴ though this is not required by the Act of 31 Charles II. In this country the practice varies with local statutes; it being sufficient, when no specific facts are alleged, for a petition in writing, attested by witnesses, to be filed.⁵ And in any view an affidavit by the relator is not required when it is shown that he is so coerced as to be unable to make one.⁶

§ 1928. MAY BE APPLIED FOR BY NEXT FRIEND. It is not necessary that the party imprisoned should sue for the writ in person. The application may be made by husband or wife, parent or child, or by any other appropriate friend or agent.¹ A mere stranger, however, having no

¹ Nye, *Ex parte*, 8 Kan. 99; *State ex rel. Sherin v. Goss*, 73 Minn. 128, 75 N. W. 1132; *State v. Dodson*, 135 Mo. 8, 36 S. W. 239; *Deny*, *Ex parte*, 10 Nev. 212; *Isbell*, *Ex parte*, 11 Nev. 299; *Allen*, *Ex parte*, 12 Nev. 87.

Facts, as contradistinguished from conclusions of law, should be stated in the petition.—*State ex rel. Sherin v. Goss*, 73 Minn. 128, 75 N. W. 1132.

Statement of facts insufficient to the illegality of the imprisonment, writ will not be granted.—*Isbell*, *Ex parte*, 11 Nev. 299; *Allen*, *Ex parte*, 12 Nev. 87; *State v. Baeverstad*, 12 N. D. 533, 97 N. W. 550.

Less stringent rule adopted in *White v. State*, 9 Miss. (1 Smed. & M.) 149.

As to New York practice, see *People ex rel. Rosenthal v. Cowles*, 59 How. Pr. (N. Y.) 287; and see,

generally, *Church on Habeas Corpus*, chapters 8 and 9.

² *Royster*, *Ex parte*, 6 Ark. (1 Eng.) 28; *Klepper*, *Ex parte*, 26 Ill. 532; *Harrison*, *In re*, 1 Cr. 159, Fed. Cas. No. 6131.

Compare: *Champion*, *Ex parte*, 52 Ill. 311.

³ *Street v. State*, 43 Miss. 1.

⁴ 1 Ch. C. L. 124; 3 Bl. Com. 132; *Gibson v. State*, 44 Ala. 17; *People v. Barnett*, 13 Abb. Pr. (N. Y.) 8; *State v. Philpot*, *Dudley* (S. C.) 46.

⁵ *Bollman*, *Ex parte*, 4 Cr. C. C. 75, Fed. Cas. No. 2653.

⁶ *Parker*, *In re*, 5 M. & W. 32.

¹ IOWA—*Thompson v. Oglesby*, 42 Iowa 598. MASS.—*Com. v. Hammond*, 27 Mass. (10 Pick.) 274; *Com. v. Downs*, 41 Mass. (24 Pick.) 227; *McConologue's Case*, 107 Mass. 154. N. Y.—*People v. Merclen*, 3 Hill 399, 38 Am. Dec. 644 (parent for child). FED.—*Fer-*

natural or legal claim to appear for the prisoner, will not be permitted to intervene.² And there may be cases in which counsel may be called upon by the court to make the affidavit.³

§ 1929. WRIT TO BE DIRECTED TO CUSTODIAN, AND TO BE SERVED PERSONALLY. The writ is to be personally served and due proof made of service, in order to justify an attachment.¹ But personal service may be waived by acceptance, either express or implied.²

When the prisoner is under sentence, the writ is to be directed to the officer having him in custody.³ And generally the custodian is the person to whom the writ should be directed.⁴ During the hearing the relator is in charge of the special officer deputed by the court.⁵

§ 1930. NOTICE MUST BE GIVEN TO PROSECUTION. Due notice of the issue of the writ and of the hearing must be given, in criminal prosecutions, to the prosecuting officer of the state having jurisdiction of the offense.¹ In matters concerning military service, the notice must be given to the proper military officer.²

§ 1931. WRIT NOT GRANTED WHEN RELATOR SHOULD BE REMANDED. When it is clear that there is no ground for the discharge, the writ will not be granted. "The ordinary course," says Shaw, C. J., "is for the court to grant a rule nisi, in the first instance, to show cause

rans, In re, 3 Ben. 442, Fed. Cas. No. 4746. ENG.—R. v. Clarke, 1 Burr. 606, 97 Eng. Repr. 471; Gregory's Case, 4 Burr. 1991, 98 Eng. Repr. 38; Daly, In re, 2 F. & F. 258.

² Poole, In re, 2 McA. (D. C.) 683; Linda v. Hudson, 35 Mass. (1 Cush.) 385; Child, Ex parte, 15 C. B. 238, 80 Eng. C. L. 237.

³ Newton, In re, 16 C. B. 97, 81 Eng. C. L. 96.

¹ See, infra, § 1935.

² People v. Bradley, 60 Ill. 390.

³ People v. Hefferman, 38 How. Pr. (N. Y.) 402.

⁴ Nichols v. Cornelius, 7 Ind. 611; Booth, In re, 3 Wis. 1.

⁵ Infra, § 1956.

¹ Lumm v. State, 3 Ind. 293; People v. Pelham, 14 Wend. (N. Y.) 48; Smith, Ex parte, 3 McL. 121, Fed. Cas. No. 12968; R. v. Taylor, 7 Dow. & Ry. 622.

² Gale, Ex parte, 3 D. & L. 114.

why the writ should not issue. Of course, if sufficient cause is not shown, it will be withheld."¹ But in all cases in which by statute the issue of the writ is obligatory, the order for its issue must be made at once; and it may also be made without a rule to show cause in all cases of urgency.² And when the question comes up on a rule nisi, the case will be treated by the court as if coming up upon the writ.³

§ 1932. RELATOR, IF IN CUSTODY, MUST BE PRODUCED IMMEDIATELY IN COURT; BUT SICKNESS CAUSE FOR DELAY. It is the duty of the person to whom the writ is addressed to produce the party imprisoned immediately in court. The time, however, may be enlarged in cases of sickness or other incapacity.¹ In such case the sickness must be specially returned, and verified by the affidavit of a medical attendant or nurse.²

§ 1933. CAUSE OF DETENTION MUST BE RETURNED. It is not enough for the respondent to bring the body of the relator into court. The cause of the detention must be returned.¹ If the detention be based on a commitment, a copy of the commitment, if not filed with the petition, must be produced.² Whatever facts are necessary to justify the detention must be set forth in the return.³

¹ *Sim's Case*, 61 Mass. (7 Cush.) 285; *Hobhouse's Case*, 3 B. & Ald. 420, 5 Eng. C. L. 246; *R. v. Marsh*, Bulstr. 27; *Blake's Case*, 2 Maule & S. 428, 105 Eng. Repr. 440.

Writ will not be granted if nugatory: ALA.—*Campbell*, Ex parte, 20 Ala. 89. KY.—*Bethuram v. Black*, 74 Ky. (11 Bush) 628. NEV.—*Deny*, Ex parte, 10 Nev. 212. PA.—*Com. v. Robinson*, 1 Serg. & R. 353; *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374. WIS.—*Gregg*, In re, 15 Wis. 179. FED.—*Kearney*, Ex parte, 20 U. S.

(7 Wheat.) 38, 5 L. Ed. 391; *Lange*, Ex parte, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872.

² *Kent*, C. J., *Stacy*, In re, 10 Johns. (N. Y.) 328.

³ *Bull*, Ex parte, 8 Jur. 827; 15 L. J. Q. B. 235.

¹ *R. v. Clarke*, 3 Burr. 1362, 97 Eng. Repr. 875.

² See *Bryant*, Ex parte, 2 Tyl. (Vt.) 269.

¹ See *Mowry*, In re, 12 Wis. 52.

² *Randall v. Bridge*, 2 Mass. 549.

³ *Yates' Case*, 4 Johns. (N. Y.) 317.

But it is enough if the facts are set forth with ordinary certainty.⁴

§ 1934. RETURN MUST NOT BE EVASIVE. If the body of the relator is not produced, on the ground that he is not in the respondent's custody, the return, in order to protect the respondent from an attachment, must be explicit in its denial. If it deny that the relator was in the respondent's control, the denial must be square and direct.¹ It has been held insufficient for the respondent to return, "I had not at the time of receiving this writ, etc., nor have I since had, the body, etc., detained, in my custody."² "The general form," said Grose, J., "is that the party has not the person in his possession, custody, or power."³ And it was held by Chancellor Kent that a return, that the relator "is not in my custody," is evasive; it should be, is not in my "possession or power."⁴ The return must show that at the time of the notice of the writ the relator was not in the power or custody of the respondent.⁵ A return, however, may be amended, after filing, at the discretion of the court.⁶ And when ambiguous, it may be explained and supported by affidavits.⁷ But when the return is explicit in denying custody or power of the relator, and is not impugned, the writ should be quashed.⁸ And so when the return avers

⁴ Eden's Case, 2 Maule & S. 226, 105 Eng. Repr. 266.

As to whether return must be sworn to, see Neill, In re, 8 Blatchf. 156, Fed. Cas. No. 10089.

¹ R. v. Winton, 5 T. R. 89, 101 Eng. Repr. 51.

See Church on Habeas Corpus, §§ 120 et seq.

² R. v. Winton, 5 T. R. 89, 101 Eng. Repr. 51.

³ United States v. Davis, 5 Cr. 622, Fed. Cas. No. 14926; War-

man's Case, 2 W. Bl. 1204, 96 Eng. Repr. 709.

⁴ Stacy, In re, 10 Johns. (N. Y.) 328.

⁵ R. v. Wagstaff, Viner's Abr. Hab. Corp. F.; Hurd's Hab. Corp., book II, ch. 3.

⁶ Watson's Case, 9 Ad. & E. 731, 36 Eng. C. L. 384; R. v. Batchelder, 1 P. & D. 516.

⁷ R. v. Roberts, 2 F. & F. 292.

⁸ Com. v. Kirkbride, 1 Brewst. (Pa.) 541; Com. v. Killacky, 3 Brewst. (Pa.) 565.

that the relator had been relieved from custody by giving bail.⁹

§ 1935. **WRIT TO BE ENFORCED BY ATTACHMENT.** In case the party addressed delays obedience to the writ within three days (to persons resident within twenty miles), according to the statute of Charles II, an attachment will, on application, be granted to compel obedience, without issuing an alias and a pluries writ,¹ on affidavit of service being made.² If the service of the attachment is resisted by superior force, the writ will be placed on the files of the court to be served when practicable.³

§ 1936. **RETURN MAY BE CONTROVERTED.** Whether a return can be controverted has been much questioned in England. In 1758 the opinions of the judges were given to the house of lords on the question whether affidavits could be received to contradict such returns; and though the weight of opinion was that this is not, as a rule, admissible, yet, by several of the judges it was conceded that in certain extreme cases,—e. g., impressments,—the court would permit the relator to show that the return was false.¹ Cases are reported in which this permission has been given;² and Lord Denman has intimated that an affidavit that the return was false might be the founda-

⁹ *Territory v. Cutler*, McCahon (Kan.) 152.

¹ ILL.—*People v. Bradley*, 60 Ill. 390. N. J.—*State v. Raborg*, 5 N. J. L. (2 South.) 545. N. Y.—*Bank of the United States v. Jenkins*, 18 Johns. 152. PA.—*Com. v. Reed*, 59 Pa. St. 425. ENG.—*Bosen*, Ex parte, 2 Ken. 289, 96 Eng. Repr. 1585; *R. v. Winton*, 5 T. R. 89, 101 Eng. Repr. 51.

² *State v. Raborg*, 5 N. J. L. (2 South.) 545. Supra, § 1929.

Attachment will not be issued, in extradition process, by state judge against federal marshal. See Mac-

donnell, In re, *Davis*, J., reported in note to same case, 11 Blatchf. 79, Fed. Cas. No. 8771; cited more fully, supra, § 1925.

³ *Moore*, Ex parte, 64 N. C. 802; *Kerr*, Ex parte, 64 N. C. 816; *Winder*, Ex parte, 2 Cliff. 89, Fed. Cas. No. 17867; *Merryman*, Ex parte, Taney 246, Fed. Cas. No. 9487.

¹ *Hurd's Habeas Corpus*, 264 et seq.; *Wilmot's Opinions* 106; 2 How. St. Tr. 1378.

² *Gilstrap*, Ex parte, 14 Tex. 240; *Goldswain's Case*, 2 W. Bl. 1207, 96 Eng. Repr. 711; *Watson's Case*, 9 Ad. & E. 731, 36 Eng. C. L. 384.

tion of a motion to quash it.³ But where the return is not traversed, it is to be treated as if demurred to by the relator.⁴

In this country, while the rule that a record can not be impugned applies to all cases in which the record of a court of general jurisdiction is produced as the ground of detention, the court, on hearing a writ of habeas corpus, when the object is to review the action of a subordinate or police magistrate, will go into the question of guilt or innocence; will examine as to the grade of guilt when the question is as to bail;⁵ and will receive evidence as to identity.⁶

³ *Watson's Case*, 9 Ad. & E. 731, 36 Eng. C. L. 384.

So far as concerns the respondent, he will be beyond question permitted to modify and explain his return. Thus it has been held that a federal judge will receive affidavits for the purpose of explaining and enlarging a return made by a state officer who has arrested a federal officer for alleged abuse of power.—*Jenkins*, Ex parte, 2 Wall. Jr. 521, Fed. Cas. No. 7259.

Whether the return may be assailed on other grounds depends on the peculiar exigency of the case. See *Smith*, Ex parte, 3 McL. 121, Fed. Cas. No. 12968.

⁴ *Milburn*, In re, 59 Wis. 24, 17 N. W. 965. See *Church on Habeas Corpus*, §§ 166 et seq.

⁵ 2 Hawk. P. C., ch. 15, § 79.

In Pennsylvania, the habeas corpus act permits the amendment of the return, "and also suggestions made against it, that thereby material facts may be ascertained." Under this clause the courts in that state are in the habit of receiving evidence to determine the fact and the degree of guilt, so as

either to discharge absolutely, or to discharge on suitable bail.—*Respublica v. Gaoler*, 2 Yeates (Pa.) 258; *Com. v. Ridgway*, 2 Ashm. (Pa.) 247; *Com. v. Carlisle*, *Bright*. (Pa.) 36.

For other cases in which the merits of the charge were gone into, see, *infra*, §§ 1952-1954; and see, also: ALA.—*Mahone v. State*, 30 Ala. 49, 68 Am. Dec. 111. IND.—*State v. Best*, 7 Blackf. 611. MASS.—*Com. v. Harrison*, 11 Mass. 63. N. H.—*State v. Scott*, 30 N. H. (10 Fost.) 274. N. Y.—*People v. Cassels*, 5 Hill 164; *People v. Martin*, 1 Park. Cr. Rep. 187; *People v. Tompkins*, 1 Park. Cr. Rep. 224; *People v. Richardson*, 4 Park. Cr. Rep. 656; *People v. McLeod*, 1 Hill 377, 37 Am. Dec. 328, 3 Hill 658. VT.—*Powers*, In re, 25 Vt. 261.

Burden of disproving the allegations of the return, however, is on the relator.—*Infra*, § 1954; *Heyward*, In re, 1 Sandf. (N. Y.) 701, and cases cited 1 *Pomeroy's Archbold* 204.

⁶ *United States v. Jung Ah Lung*, 124 U. S. 621, 31 L. Ed. 591, 8 Sup. Ct. Rep. 663.

The conflict, in other respects, even on the English rule, may be obviated, by applying to returns the familiar distinction that while a record can not be assailed by parol except in cases where fraud or want of jurisdiction is set up, it may be explained by parol when obscure or incomplete.⁷ Hence, when such a record is produced, it is admissible to show that the court had no jurisdiction of the subject-matter, or that the proceedings were fraudulent.⁸ When the case does not rest on the return, then the court may go into the merits.⁹ The distinction between our practice and that of England is this: With us, as has been seen, a commitment by a subordinate police magistrate may be opened and the case considered de novo by a court of general jurisdiction when hearing the writ; while in England it can not.¹⁰

§ 1937. DISCHARGE FROM DEFECTS OF PROCESS; AND SO IN CASE OF OPPRESSION. Arrest, when examined in court on a writ of habeas corpus, may be considered in two relations. The first arises when the court sits merely for the purpose of examining the validity of the arrest, and not in exercise of the powers of a justice of the peace. In such cases, if the arrest be on void process, the relator should be discharged.¹ Thus parties against whom no criminal charge is made out, or whom the court on habeas corpus has no jurisdiction to arrest de novo, have been released from custody under warrants having no seal;² and from warrants when the relator is privileged

⁷ See 2 Whart. on Ev. (Hilton's ed.), §§ 980 et seq.

⁸ Ibid. Supra, § 1926; *infra*, § 1939.

⁹ State v. Scott, 30 N. H. (10 Fost.) 274; People v. Martin, 1 Park. Cr. Rep. (N. Y.) 187; People v. Tompkins, 1 Park. Cr. Rep. (N. Y.) 224.

¹⁰ Newton, *Ex parte*, 313 Ad. & E. N. S. (13 Q. B.) 716, 66 Eng. C. L. 716.

¹ Conner v. Com., 3 Binn. (Pa.) 38; State v. Potter, 1 Dud. (S. C.) 295; Com. v. Murray, 4 Va. (2 Va. Cas.) 504.

As to what constitutes illegality of apprehension, see, supra, § 31.

As to privilege from apprehension and arrest, see, supra, §§ 10-20.

² State v. Drake, 36 Me. 366, 58 Am. Dec. 757; Lough v. Millard, 2 R. I. 436; Tackett v. State, 11

from arrest.³ But a court, on the hearing of a writ of habeas corpus, will not, ordinarily, consider the constitutionality of the law authorizing the arrest. Such questions, when dependent upon a contested interpretation, are to be reserved for the trial.⁴

The second relation in which writs of habeas corpus addressed to arresting officers are to be considered is that which arises when the court sits for the purpose not merely of examining the validity of the arrest, but of also determining whether the relator is *prima facie* guilty of an indictable offense. If the latter turn out on the hearing to be the case, then the relator must be held to answer on the charge of committing such offense, no matter how outrageously oppressive or illegal may have been the process by which he was arrested.⁵ The party arresting may have been guilty of such violence or fraud in the arrest as to require that he also should be held to trial for his misconduct. But this does not affect the relator's responsibility. If a probable case of guilt transpire against him at the hearing, he must be held to trial, even though he were actually kidnapped into court, and though the offense proved is not specifically that charged.⁶

A writ of habeas corpus may issue from a superior court to give immediate hearing to a case should there be any undue delay in the action of an inferior court.⁷

Tenn. (3 Yerg.) 392; Bennett, *Ex parte*, 2 Cr. 612, Fed. Cas. No. 1311.

Compare: Smith, *Ex parte*, 5 Cow. (N. Y.) 273.

³ Eggington, *Ex parte*, 2 El. & Bl. 717, 75 Eng. C. L. 717; Dakins, *Ex parte*, 16 S. C. 77.

⁴ Harris, *In re*, 47 Mo. 164.

⁵ See, *supra*, §§ 59, 87, 269; *infra*, § 1941.

⁶ *Supra*, § 59; *infra*, §§ 1941, 1952, and, also: CAL.—Granice, *Ex*

parte, 51 Cal. 375. DEL.—State v. Buzine, 4 Harr. 575. GA.—Brady v. Davis, 9 Ga. 73. ME.—O'Malla v. Wentworth, 65 Me. 129. S. C.—State v. Killett, 2 Ball. L. 289. VA.—Jones v. Timberlake, 27 Va. (6 Rand.) 678. ENG.—R. v. Marks, 3 East 157, 102 Eng. Repr. 557, 6 Rev. Rep. 577; R. v. Goodall, 1 Say. 129.

⁷ *Supra*, § 111.

§ 1938. WRIT MAY TEST EXTRADITION PROCESS. We have already seen that the writ may be issued to test the legality of arrests on extradition process, whether such process come from a sister state or from a foreign state.¹ When the process is from a sister state, under the provision in the federal constitution, and is regular, a discharge will not be granted, supposing the identity of the party and the genuineness of the record be established.² Not only will the court, on hearing the writ, decline to go into the merits, but the questions of formal law, connected with the structure of the indictment, will not be considered, this being matter for the courts of the demanding state.³ The recitals in the warrant of the governor of the asylum state will be treated as true;⁴ though notice will be taken of material defects in the warrant.⁵ Nor will an apprehension by state officials of officers employed in extradition process under the federal constitution be permitted; and if such apprehension be made, the party apprehended will be discharged by a federal court.⁶ Nor does the writ lie to admit to bail a person under apprehension to be carried into another county or

¹ See *Woodhall's Case*, L. R. 20 Q. B. Div. 833; *Church on Habeas Corpus*, §§ 459 et seq.

² *Supra*, §§ 69, 73. CAL.—*Watson*, In re, 2 Cal. 59; *White*, Ex parte, 49 Cal. 434. N. Y.—*People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *Bristow*, In re, 51 How. Pr. 422. TEX.—*Hibler v. State*, 43 Tex. 197. FED.—*McKean*, Ex parte, 3 Hughes 23, Fed. Cas. No. 8848; *Smith*, Ex parte, 3 McL. 121, Fed. Cas. No. 12968; *Doo Woon*, In re, 18 Fed. 898.

In *Robinson v. Flanders*, 29 Ind. 10, it was held that the question of identity was for the demanding state.

³ *Supra*, §§ 91 et seq.; *Manchester*, In re, 5 Cal. 237; *State v. Bu-*

zine, 4 Harr. (Del.) 572; *Davis' Case*, 122 Mass. 324; *Voorhees*, In re, 32 N. J. L. (3 Vr.) 141; *Clark*, In re, 9 Wend. (N. Y.) 212.

⁴ *Supra*, § 69; *People ex rel. Draper v. Pinkerton*, 77 N. Y. 245, affirming 17 Hun 199; *Leary*, In re, 10 Ben. 197, Fed. Cas. No. 8162.

⁵ *Leland*, In re, 7 Abb. Pr. N. S. (N. Y.) 64; *Rutter*, In re, 7 Abb. Pr. N. S. (N. Y.) 67; *supra*, §§ 69 et seq.

⁶ *Titus' Case*, 8 Ben. 411, Fed. Cas. No. 14062; *Bull*, In re, 4 Dill. 323, Fed. Cas. No. 2119; *Jenkins*, Ex parte, 2 Wall. Jr. 521, Fed. Cas. No. 7259; *United States v. McClay*, 23 Int. Rev. Rec. 80, Fed. Cas. No. 15660; and cases cited, *supra*, § 74.

state for trial.⁷ But when there is an apprehension to await a requisition, and after due time the warrant does not arrive, the prisoner will be discharged.⁸

The writ, also, may be granted to test the validity of process of extradition when the demandant is a foreign sovereign;⁹ though in such cases the Supreme Court of the United States will not renew technical decisions of commissioners as to admissibility of evidence.¹⁰ That a state court may also intervene in such cases by issuing the writ was at one time claimed;¹¹ but now the tendency of authority is that in all matters of foreign extradition which relate to federal statutes or treaties, the jurisdiction of the federal courts is exclusive.¹²

⁷ Gorsline, *In re*, 10 Abb. Pr. (N. Y.) 282. *Supra*, § 70.

⁸ *Porter v. Goodhue*, 2 Johns. Ch. (N. Y.) 198 (a state requisition). See other cases, *supra*, §§ 67, 68.

⁹ *Atty.-Gen. v. Kwok-a-Sing*, L. R. 5 P. C. 179, and cases cited, *supra*, §§ 77, 78.

See *Ker, in re*, 18 Fed. 167, 10 Rep. 530, where it was held that a writ of habeas corpus would not issue in a federal court to release a prisoner who was kidnaped in a foreign country and committed by a state court having jurisdiction of the crime charged against him. See 4 Crim. Law Mag. 913; see, *supra*, § 59.

¹⁰ *Benson v. McMahon*, 127 U. S. 457, 32 L. Ed. 234, 8 Sup. Ct. 1240.

¹¹ *Com. v. Hawes*, 76 Ky. (13 Bush) 697, 26 Am. Rep. 242.

¹² *Supra*, § 1926. See *People v. Curtis*, 50 N. Y. 321, 10 Am. Rep. 483; *People v. Flisk*, 45 How. Pr. (N. Y.) 296, reported, *supra*, § 1925; *Lagrange, in re*, 45 How. Pr. (N. Y.) 301; *Com. v. Deacon*, 10 Serg. & R. (Pa.) 125.

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In Adrian v. Lagrave, 59 N. Y. 110, 17 Am. Rep. 317, it was held that a state court will not intervene to relieve a party who claims that the extradition process by which he is brought into the state was fraudulently obtained, and does not cover the act for which he is arrested after his arrival in the country.

As to void sentences, see article by Judge Thompson in 4 Crim. Law Mag. 799.

The inconvenience, if not the unconstitutionality, of the issue of such writs by state judges, in extradition cases, is pointed out by Mr. Buchanan, in letters, when Secretary of State, to Mr. Butler, Dist. Atty. in N. Y., March 23, 1847; *Mss. Dom. Let. Dep. of State*; and to Mr. Durant, Dist. Atty. in New Orleans, May 20, 1847, *ibid.* Mr. Cushing, in 1853, when Attorney-General, denied the right of a state court to take up the case by habeas corpus while it was under examination by a commissioner of the United States.

§ 1939. **WRIT MAY OBTAIN REDRESS FOR VOID SENTENCE.** The writ may be made to operate in behalf of a person sentenced by a court without jurisdiction to impose the particular sentence,¹ or detained under a sentence based on information in a federal court for an infamous crime,² or detained under a sentence which on its face has expired or is inoperative.³ In other words, when a sen-

¹ *People ex rel. Cowley v. Bowe*, 58 How. Pr. (N. Y.) 174; *Lange, Ex parte*, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872; *Callicot, Ex parte*, 8 Blatchf. 89, Fed. Cas. No. 2323.

In *Lange, Ex parte*, 85 N. S. (18 Wall.) 163, 21 L. Ed. 872, it was held that where a prisoner shows that he is held under a judgment of a federal court, made without authority of law, the Supreme Court of the United States will, by writ of habeas corpus and certiorari, look into the record so far as to ascertain that fact, and if it is found to be so, will discharge the prisoner. See this case discussed, *supra*, §§ 1434, 1853.

To the same effect, see *Murray, Ex parte*, 43 Cal. 455; *Bowen, Ex parte*, 46 Cal. 112; *Page, Ex parte*, 49 Mo. 291; *Roberts, Ex parte*, 9 Nev. 43.

Compare: *Supra*, § 1926. And see *Virginia, Ex parte*, 100 U. S. 339, 25 L. Ed. 676.

² *Wilson, Ex parte*, 114 U. S. 417, 29 L. Ed. 89, 5 Sup. Ct. Rep. 935.

³ CAL.—*Gibson, Ex parte*, 31 Cal. 619, 91 Am. Dec. 546. KAN.—*Millington, In re*, 24 Kan. 214. MD.—*State v. Glenn*, 54 Md. 572. MICH.—*Howard v. People*, 3 Mich. 207; *Underwood, In re*, 30 Mich. 502. MO.—*Pope, Ex parte*, 49 Mo. 491; *Snyder, Ex parte*, 64 Mo. 58.

NEV.—*Roberts, Ex parte*, 9 Nev. 43. OHIO.—*Shaw, Ex parte*, 7 Ohio St. 81, 70 Am. Dec. 55. TEX.—*Perry v. State*, 41 Tex. 488. FED.—*Wong Qui, In re*, 6 Sawy. 237, 47 Fed. 717.

Alternative sentence of fine or imprisonment, fine having been paid, court can not modify sentence to imprisonment only.—*Lange, Ex parte*, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872.

Invalid sentence partly served, reversed on application of prisoner, court may sentence under new statute passed after commission of the crime.—*Murphy v. Massachusetts*, 177 U. S. 160, 44 L. Ed. 714, 20 Sup. Ct. Rep. 641.

No power to sentence for felony under verdict, judgment void, and prisoner will be released.—*Burden, Ex parte*, 92 Miss. 27, 131 Am. St. Rep. 511, 45 So. 2; *State v. District Court*, 35 Mont. 325, 89 Pac. 65.

Sentence for grand larceny on plea of guilty of petit larceny, under statute prescribing infliction of punishment for grand larceny on conviction of second offense of petit larceny, the judgment reciting that the defendant having been heretofore convicted of petit larceny, he is found guilty of grand larceny, is void.—*Miskimins, Ex parte*, 8 Wyo. 392, 49 L. R. A. 831; sub nom. *Miskimmins*

tence is on its face so defective that with it the whole proceeding falls, the prisoner may be released on habeas corpus; though, as will presently be seen, for matters within the province of the trial court, the remedy must be by writ of error or motion for a new trial.⁴ Nor can

v. Shaner, 58 Pac. 411; *Bandy v. Hen*, 10 Wyo. 176, 67 Pac. 981.

Want of jurisdiction in particular case, conviction and sentence for contempt, prisoner will be released on habeas corpus.—*Creasy*, *Ex parte*, 243 Mo. 696, 41 L. R. A. (N. S.) 478, 148 S. W. 919.

Term of sentence longer than authorized by law, prisoner will be discharged on habeas corpus.—*Cox*, *Ex parte*, 3 Idaho 534, 95 Am. St. Rep. 32, 32 Pac. 198.

In *People ex rel. Tweed v. Liecomb*, 60 N. Y. 559, 19 Am. Rep. 211, hereafter discussed, it was held that the clause in the N. Y. Rev. Stat. 568, § 42, prohibiting the review, under a writ of habeas corpus, of the "legality and justice of any process, judgment, decree, or execution," does not preclude the court issuing the writ from inquiring whether the court entering the judgment had the power to give such judgment.

See, however, criticism, *infra*, § 1943; *supra*, §§ 1515, 1841, 1874. And see, also, *Kirby v. State*, 62 Ala. 51; *Kelly*, *Ex parte*, 65 Cal. 154, 3 Pac. 673; *Phillips*, *Ex parte*, 57 Miss. 357.

As to cases of release under cumulative sentences, see, *supra*, § 1875.

As to discharge from operation of limitation or pardon, see, *infra*, § 1953.

⁴ *Wentworth v. Alexander*, 66 Ind. 30; *Petty*, *In re*, 22 Kan. 477;

United States v. Reed, 100 U. S. 13, 25 L. Ed. 538, 26 Int. Rev. Rec. 11.

See, also, *infra*, § 1941.

"If the fine or imprisonment be either less (*Shaw*, *Ex parte*, 7 Ohio St. 81, 70 Am. Dec. 55) or greater (*Van Hagan*, *Ex parte*, 25 Ohio St. 426) than that prescribed in the statute, the sentence was not void but erroneous, and therefore habeas corpus is not, but error to reverse the proceedings or sentence is the remedy."—*Okey*, C. J., *Dillen v. State*, 38 Ohio St. 586. *Supra*, § 1858.

When the sentence or commitment is void, as resting on an unconstitutional law, the writ lies.—*Brown v. Duffus*, 66 Iowa 193, 23 N. W. 396; *Mato*, *Ex parte*, 19 Tex. App. 112; *Rollins*, *Ex parte*, 80 Va. 314; *Ah Jou*, *In re*, 20 Fed. 181.

Compare: *Boenninghausen*, *Ex parte*, 21 Mo. App. 267, 91 Mo. 301, 1 S. W. 761.

Where sentence imposed by court without jurisdiction, writ lies.—*People v. Warden*, 100 N. Y. 20, 2 N. E. 870; *Fisk*, *Ex parte*, 113 U. S. 713, 28 L. Ed. 1117, 5 Sup. Ct. Rep. 724; *Snow*, *In re*, 120 U. S. 274, 30 L. Ed. 658, 7 Sup. Ct. Rep. 556.

When sentence or commitment void on its face, writ lies.—*Garvey*, *In re*, 7 Colo. 384, 49 Am. Rep. 358, 3 Pac. 903; *Barker*, *In re*, 56 Vt. 14; *Brainerd*, *In re*, 56 Vt. 495; *Mo-*

the averments of a court of record be in this way collaterally impeached, however open they might be to criticism as a writ of error.⁵

§ 1940. — BUT CAN NOT OVERHAUL INDICTMENT, OR MATTERS WITHIN PROVINCE OF TRIAL COURT. It has been already noticed that the rule, that the record of a court of general jurisdiction can not be collaterally impeached unless on ground of want of jurisdiction or fraud applies to the records of such courts when brought up collaterally on a writ of habeas corpus. This rule holds in all cases in which the writ is applied for by a party against whom an indictment has been found by a court having jurisdiction. In such case, the question being whether there is probable cause for the prosecution, the indictment,—unless impeachable for fraud, or non-identity, or want of jurisdiction,—is conclusive proof of such probable cause.¹ A fortiori the averments of a sentence of conviction can not be disputed on a writ of habeas corpus, unless under the limitations above given, of fraud, non-identity, or want of jurisdiction.² But it is to

Laughlin, *In re*, 58 Vt. 136, 4 Atl. 862, and cases cited above.

And so where the sentence was on an indictment, which was amended after finding it was in conflict with the V Amendment of the Constitution of the United States.—Bain, *Ex parte*, 121 U. S. 1, 30 L. Ed. 849, 7 Sup. Ct. Rep. 781. See, *supra*, § 131.

⁵ See, *infra*, § 1941.

¹ Whitaker, *In re*, 43 Ala. 323; McLeod's Case, 25 Wend. (N. Y.) 483; Semler, *In re*, 41 Wis. 517; R. v. Bowen, 9 Car. & P. 509, 38 Eng. C. L. 300.

Indictment and warrant may be inquired into on habeas corpus, to determine whether they are absolutely void.—People *ex rel.* Pick-

ard v. Chautauqua County, 11 N. Y. Civ. Proc. Rep. 172.

Police court of inferior jurisdiction, and its proceedings must affirmatively show jurisdiction of the defendant and over the subject-matter.—Kearney, *Ex parte*, 55 Cal. 214, overruling, as mere dictum, holding to the contrary in Murray, *Ex parte*, 43 Cal. 455, 458.

² ALA.—Ray, *Ex parte*, 45 Ala. 15; Sam, *Ex parte*, 51 Ala. 34. CAL.—Murray, *Ex parte*, 43 Cal. 455; Le Bur, *Ex parte*, 49 Cal. 160. COLO.—People *ex rel.* Atty.-Gen. v. District Court, 26 Colo. 380, 46 L. R. A. 855, 58 Pac. 608. IOWA—State v. Orton, 67 Iowa 554, 25 N. W. 775. MASS.—Riley's Case, 19 Mass. (2 Pick.) 172; Com. v. Whitney, 27 Mass. (10 Pick.) 434;

Fleming v. Clark, 94 Mass. (12 Allen) 191; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374. MICH.—*Coffeen*, In re, 38 Mich. 311. MO.—*Trueman*, In re, 44 Mo. 181. N. Y.—*People v. McLeod*, 1 Hill 377, 37 Am. Dec. 328; *People ex rel. Martin v. Walters*, 15 Abb. N. C. 461, 7 N. Y. Civ. Proc. Rep. 406; *People v. McCormack*, 4 Park. Cr. Rep. 9; *People v. Devine*, 5 Park. Crim. Rep. 62, 21 How. Pr. 80; *People v. Neilson*, 16 Hun 214; *Wright*, In re, 29 Hun 357, 65 How. Pr. 119. N. C.—*Buddington*, In re, 74 N. C. 607. OHIO—*Van Hagan*, Ex parte, 25 Ohio St. 426. PA.—*Dickinson v. Byron*, 9 Serg. & R. 71; *Com. ex rel. Davis v. Lecky*, 1 Watts 66, 26 Am. Dec. 37. TEX.—*Ezell*, Ex parte, 40 Tex. 451, 19 Am. Rep. 32. UTAH—*Hays*, Ex parte, 15 Utah 77, 47 Pac. 612. VA.—*Ball*, Ex parte, 43 Va. (2 Gratt.) 588; *Marx*, Ex parte, 86 Va. 40, 9 S. E. 475. WYO.—*Younger v. Hen*, 12 Wyo. 297, 109 Am. St. Rep. 986, 75 Pac. 443. FED.—*Parks*, Ex parte, 93 U. S. 18, 23 L. Ed. 787; *Reed*, Ex parte, 100 U. S. 13, 25 L. Ed. 538; *Siebold*, Ex parte, 100 U. S. 371, 25 L. Ed. 717; *Yarbrough*, Ex parte, 110 U. S. 651, 28 L. Ed. 274, 4 Sup. Ct. Rep. 152; *Bogart*, In re, 2 Sawy. 396, Fed. Cas. No. 1596. ENG.—*Brenan*, In re, 10 Ad. & E. N. S. (10 Q. B.) 492, 59 Eng. C. L. 492; *Lees*, Ex parte, 1 El., Bl. & El. 828; *R. v. Mount*, L. R. 6 P. C. 283.

As to power of court, on habeas corpus, to go behind judgment, see note, 45 Am. Dec. 133.

As to what questions are involved in habeas corpus proceedings, see notes, 59 Am. Dec. 243; 57 Am. St. Rep. 807.

Illegality of selection of grand jury can not be tested on habeas corpus after conviction and sentence.—*State v. Fenderson*, 28 La. Ann. 82.

Irregularities in the trial can not be examined on habeas corpus.—*Max*, Ex parte, 44 Cal. 579; *Granice*, Ex parte, 51 Cal. 375; *State v. Sheriff*, 24 Minn. 87; *Ruthven*, Ex parte, 17 Mo. 541.

As to irregularities which do not render sentence void, see 4 Crim. Law Mag. 803.

—On the other hand, it has been ruled that where a petition for a writ of habeas corpus avers that the petitioners, being colored persons, have been tried for a capital offense before a state court, by a jury entirely composed of white persons, in contravention of U. S. Rev. Stat., § 641, 4 Fed. Stats. Ann., 1st ed., p. 258 (now Judiciary Code, § 31, 5 Fed. Stats. Ann., 2d ed., p. 376), the Circuit Court of the United States will grant the writ commanding the sheriff of the county to produce the bodies of the petitioners before the court, with a statement of the cause of their detention.—Ex parte Reynolds, 3 Hughes 559, Fed. Cas. No. 11720.

See, also, cases supra, § 1926.

And so where the offense is against the federal courts, the state courts having no jurisdiction.—*Bridges*, Ex parte, 2 Woods 428, Fed. Cas. No. 1862.

Judgment can not be attacked on habeas corpus, unless want of jurisdiction in the sentencing court is shown.—*Branch*, Ex parte, 36 Tex. Cr. Rep. 384, 37 S. W. 421. See *People v. Cassels*, 5 Hill (N. Y.) 164; *Hillbaugh v. Hen*, 13 Wyo. 273, 79 Pac. 1044.

be observed, in passing, that in any one of these cases the writ may be granted.³

—Or judgment void for any reason.—*Japan, Ex parte*, 36 Tex. Cr. Rep. 482, 38 S. W. 43.

Defect in judgment or process must be such as to render same void before judgment can be attacked on habeas corpus. See note, 26 Am. Dec. 41.

Jurisdictional inquiry on habeas corpus, extends to power of court or magistrate to commit.—*State ex rel. Stylees v. Beaverstad*, 12 N. D. 532, 97 N. W. 548; *Hovey v. Sheffner*, 16 Wyo. 265, 125 Am. St. Rep. 1037, 15 Ann. Cas. 318, 15 L. R. A. (N. S.) 230, 93 Pac. 305.

Loss of jurisdiction of justice of the peace to convict and sentence, can not be raised on habeas corpus.—*People ex rel. Martin v. Walters*, 15 Abb. N. C. (N. Y.) 461, 7 N. Y. Civ. Proc. Rep. 406.

On commitment before indictment, court may, on habeas corpus, go back of the examination of the committing magistrate.—*People v. Martin*, 2 Edm. Sel. Cas. (N. Y.) 28, 1 Park. Cr. Rep. 187, 7 N. Y. Leg. Obs. 49.

Compare: *Bion, In re*, 59 Conn. 377, 11 L. R. A. 700, 20 Atl. 662, holding errors, irregularities, or insufficiency of evidence in commitment case not reviewable in habeas corpus.

In *Siebold, Ex parte*, 100 U. S. 371, 25 L. Ed. 717, supra, § 1926, it was held that the appellate jurisdiction of the Supreme Court of the United States, exercisable by habeas corpus, extends to a case of imprisonment upon conviction and sentence in an inferior court of the United States, under and by vir-

tue of an unconstitutional act of Congress, whether this court has jurisdiction to review the judgment by writ of error or not; and that the jurisdiction of this court by habeas corpus, when not restrained by some special law, extends generally to imprisonment by inferior tribunals of the United States which have no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional act. It was further held that when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error. See further, *infra*, § 996 b.

In *Yarbrough, Ex parte*, 110 U. S. 651, 28 L. Ed. 274, 4 Sup. Ct. Rep. 152, the right of the Supreme Court of the United States in this way to revise the action of a circuit court in case of want of jurisdiction was affirmed; but it was held that technical errors of law could not be in this way corrected. And see *People v. Kelly*, 39 Hun (N. Y.) 536.

³ This is the case where the inferior court has no jurisdiction. See *Yarbrough, Ex parte*, 110 U. S. 651, 28 L. Ed. 274, 4 Sup. Ct. Rep. 152.

Supreme Court of the United States can in this way determine the power of an inferior court to try and sentence a prisoner, but can not review the rulings of such

§ 1941. WRIT CAN NOT COLLATERALLY CORRECT ERRORS. What has just been said rests on the general proposition that where a court of record¹ has jurisdiction, its action, though open to revision by appeal or writ of error, can not be collaterally impeached, unless on proof of fraud.² No matter how gross, therefore, may be the mistakes of law or fact by a court of record having jurisdiction in a criminal case, its action can not be reviewed, subject to the limitations above stated, by a writ of habeas corpus.³

court when having jurisdiction. See *Carll*, Ex parte, 106 U. S. 521, 27 L. Ed. 288, 1 Sup. Ct. Rep. 535.

¹ Presumption of regularity does not apply to courts not of record. See *Whart. on Ev.*, § 1308; 1 *Whart. Crim. Ev.* (Hilton's ed.), § 830.

² See *Whart. on Ev.*, §§ 982-991.

³ CAL.—*Hartman*, Ex parte, 44 Cal. 32. COLO.—*Farnham*, Ex parte, 3 Colo. 545. KAN.—*Petty*, In re, 22 Kan. 477. ME.—*O'Malia v. Wentworth*, 65 Me. 129. MICH.—*Eaton*, In re, 27 Mich. 1; *Burger*, In re, 30 Mich. 203; *Faust v. Judge*, etc., 30 Mich. 266. MINN.—*State v. Hennepin, Sheriff*, 24 Minn. 87. MISS.—*Emanuel v. State*, 36 Miss. 627. MO.—*Kauffman*, Ex parte, 78 Mo. 588. NEB.—*Johnson*, Ex parte, 15 Neb. 512, 19 N. W. 594. NEV.—*Fisher*, Ex parte, 6 Nev. 309; *Winston*, Ex parte, 9 Nev. 71; *Twohig*, Ex parte, 13 Nev. 302; *Bergman*, Ex parte, 18 Nev. 331, 4 Pac. 209. N. Y.—*People v. Nevins*, 1 Hill 154; *People v. Cavanagh*, 2 Park. Cr. Rep. 650. PA.—*Com. v. Leckey*, 1 Watts 66, 26 Am. Dec. 37; *Com. v. Keeper of Prison*, 26 Pa. St. 279. TEX.—*Oliver*, Ex parte, 3 Tex. App. 345; *McGill*, Ex parte, 6 Tex. App. 498; *Boland*, In re, 11 Tex. App. 159.

VT.—*Kellogg*, Ex parte, 6 Vt. 509. WIS.—*Crandell*, In re, 34 Wis. 177; *Semler*, In re, 41 Wis. 517; *Eldred v. Ford*, 46 Wis. 530, 1 N. W. 175. FED.—*Coy*, In re, 127 U. S. 731, 32 L. Ed. 274, 8 Sup. Ct. Rep. 1263. ENG.—*R. v. Carille*, 4 Car. & P. 415, 19 Eng. C. L. 580; *Barnes' Case*, 2 Roll. 157, 81 Eng. Repr. 722; *R. v. Elwell*, 2 Stra. 794, 93 Eng. Repr. 853.

Matters within discretion of trial court, writ of habeas corpus will not lie to overhaul: ALA.—*Simmons*, Ex parte, 62 Ala. 416; *State*, Ex parte, 76 Ala. 482; *Cameron*, Ex parte, 81 Ala. 87, 1 So. 20. CAL.—*Moan*, Ex parte, 65 Cal. 216, 3 Pac. 644. ILL.—*Thompson*, Ex parte, 93 Ill. 89. IND.—*Smith v. Hess*, 91 Ind. 424; *Willis v. Bayles*, 105 Ind. 363, 5 N. E. 8; *McGuire v. Wallace*, 109 Ind. 284, 10 N. E. 111. IOWA.—*State v. Orton*, 67 Iowa 554, 25 N. W. 775. KAN.—*Edwards*, Ex parte, 35 Kan. 99, 10 Pac. 539. LA.—*State v. Sheriff*, 37 La. Ann. 617. MICH.—*Hamilton's Case*, 51 Mich. 174, 16 N. W. 327. MINN.—*State v. Hayden*, 35 Minn. 283, 28 N. W. 659. N. Y.—*People v. Kelly*, 97 N. Y. 212, modifying 32 Hun 536; *People v. Walters*, 15 Abb. N. C. 461. TEX.—*Fuller*, Ex parte, 19 Tex. App. 241. WIS.—

Even an excessive sentence, by a competent court, if not actually inoperative, can not in this way be rectified. The remedy is writ of error to a court with appellate powers.⁴ Nor will the writ be used to control the discretion committed to officers of a prison to modify or ameliorate confinement.⁵ Even though the cause of detention be an order of court without judgment, this, if the order be by a court having jurisdiction, will not be reviewed even by a superior court by means of habeas corpus. Thus, where, on an indictment containing several counts, the jury acquitted on some counts but said nothing as to others, it was held in Pennsylvania, by the supreme court, that an order of detention by the trial court could not be overhauled by a habeas corpus issued by the supreme court; but that if an error should occur in the subsequent trial and conviction of the defendant on the counts thus left open, the remedy would be a writ of error.⁶ Nor, under the Pennsylvania statute, will the supreme court, by writ of habeas corpus, grant relief, during the term of a court of quarter sessions, to a person bound over to that term.⁷ Nor can the validity of the commissions of de facto judges or other officers, having colorable titles, be thus tried.⁸ Thus, Chief Justice Chase refused to review,

Houser v. State, 33 Wis. 678; *Milburn, Ex parte*, 59 Wis. 24, 17 N. W. 965; *State v. Sloan*, 65 Wis. 647, 651, 27 N. W. 616. FED.—*United States v. Reed*, 100 U. S. 13, 25 L. Ed. 538; *Crouch, Ex parte*, 112 U. S. 178, 28 L. Ed. 690, 5 Sup. Ct. Rep. 96; *Harding, Ex parte*, 120 U. S. 782, 30 L. Ed. 824, 7 Sup. Ct. Rep. 780; *Bigelow, Ex parte*, 113 U. S. 328, 28 L. Ed. 1005, 5 Sup. Ct. Rep. 542; *Ker, Ex parte*, 18 Fed. 167; *Byron, In re*, 18 Fed. 722.

Matters of executive discretion can not be thus reviewed. See *Gilson, Ex parte*, 34 Kan. 641, 9 Pac. 763.

⁴ *Lark v. State*, 55 Ga. 435; *Shaw, Ex parte*, 7 Ohio St. 81; *Pember's Case*, 1 Whart. (Pa.) 439.

Where the sentence is inoperative, see, *supra*, § 1939.

⁵ *Com. v. Holloway*, 42 Pa. St. 446, 82 Am. Dec. 526. See *Pember's Case*, 1 Whart. (Pa.) 439.

⁶ *Com. v. Norton*, 8 Serg. & R. (Pa.) 71.

⁷ *Com. v. Sheriff*, 7 Watts & S (Pa.) 108.

⁸ *Com. v. Fowler*, 10 Mass. 290; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; *Strang, Ex parte*, 21 Ohio St. 610; *Boyle, In re*, 9 Wis. 284; *State v. Bartlett*, 35 Wis.

on habeas corpus, the sentences of courts of the Confederate States during the Civil War.⁹ Nor will the title or procedure of a committing magistrate be thus examined collaterally, if a probable case of guilt be made out on the merits, and the question be as to such guilt.¹⁰ But, as we have seen, where the sentence is one plainly beyond the jurisdiction of the court imposing it, a writ of habeas corpus may be issued by a court having general supervisory jurisdiction,—e. g., in England the queen's bench,—to relieve the prisoner. And this holds where a sentence has expired, or is otherwise inoperative.¹¹

§ 1942. — **NOR WILL HEARING BE INTERRUPTED.** Unless the case be one of oppression, the hearing on a criminal charge before a committing magistrate will not be interrupted by a writ of habeas corpus.¹

§ 1943. **DISTINCTIVE PRACTICE IN CASES IN WHICH THERE IS NO WRIT OF ERROR.** A distinction is to be noted between errors which can be corrected by appeal or writ of error and errors which can not be so corrected. Under the old English practice, where there was no writ of error in criminal cases, the courts were led, in cases of imprisonment claimed to be manifestly and grossly erroneous, to hear the question of the validity of such imprisonments on writs of habeas corpus. A similar condition exists in our federal courts, in those cases,—e. g., prosecutions in circuit or district courts,—in which the only mode of

237; *Ah Lee, In re*, 6 Sawy. 410, 5 Fed. 899.

See 4 Crim. Law Mag. 808, and 1 Kerr's Whart. Crim. Law, § 690.

⁹ *Strahl, Ex parte*, 16 Iowa 369; *People v. Terry*, 108 N. Y. 1, 14 N. E. 815; *Russell v. Whitting*, 60 N. C. (1 Wins.) 463; *Call, Ex parte*, 2 Tex. App. 560; *Griffin's Case*, Chase 364, Fed. Cas. No. 5815, 8 Am. L. Reg. N. S. 358, 25 Tex. Supp. 623.

See *McCrary on Elections*, § 221. 10 *Supra*, § 1937; *Raye, Ex parte*,

63 Cal. 491; *Thompson, Ex parte*, 93 Ill. 89; *Garst, Ex parte*, 10 Neb. 78, 4 N. W. 511; *Wakker, In re*, 3 Barb. (N. Y.) 162.

¹¹ *Supra*, § 1939.

A conviction based on invalid waiver of jury trial may be thus inquired into.—*Staff, In re*, 63 Wis. 285, 23 N. W. 587. *Supra*, § 1668.

¹ *Peoples, In re*, 49 Mich. 626.

obtaining revision is that which depends on the rare contingency of a certified difference of opinion between the judges trying the case. Under such circumstances it was but natural that the writ of habeas corpus should be applied for in cases in which a prisoner was held in custody under process which was believed to be in conflict with the federal constitution or statutes. The disposition of the Supreme Court of the United States was, for a time, to recognize this distinction so far as to hold that it could revise by habeas corpus an "illegal or void" judgment of an inferior federal court; but more recently the position seems to be taken that where such inferior court has jurisdiction habeas corpus is not the remedy.¹

¹ In *Siebold, Ex parte*, 100 U. S. 371, 25 L. Ed. 717, cited *supra*, §§ 1926, 1940, the following is from the opinion of the court, given by Bradley, J.:

"The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void. *This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of Ex parte Lange*, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872, and *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787. In the former case we held that the judgment was void, and released the prisoner accordingly; in the latter we held that the judgment, whether erroneous or not, was not void because the court had jurisdiction of the cause; and we refused to interfere." The difficulty here is in the words "illegal or

void." If a writ of habeas corpus can issue to correct illegal judgments, then the writ of habeas corpus becomes a writ of error. But the distinction taken in the italicised passage between an "erroneous" judgment and one that is "illegal or void" would show that "error" and "illegality" are not regarded as convertible.

As conflicting with *Lange's Case*, see *Hagen, Ex parte*, 25 Ohio St. 426.

In *Lange, Ex parte*, above cited (see, *supra*, §§ 1716, 1853, 1933), the discharge was put on the ground of erroneous action of the court below (a district federal court) in amending a sentence after the defendant had been in prison under it for five days. It was held that after a sentence has been in part executed it can not be amended, and that the amending sentence in such case is a nullity, and the defendant is to be released. But to this it may be objected that, if the Supreme Court of the United States can make such error ground of release on

habeas corpus, the function of releasing prisoners on ground of error of sentence would be vested in every judge to whom the right of issuing a writ of habeas corpus belongs. See dissenting opinion of Clifford, J., in *Lange's Case*.

Prisoner convicted under unconstitutional law, may be discharged on habeas corpus.—Siebold, *Ex parte*, 100 U. S. 371, 25 L. Ed. 717, and Clark, *Ex parte*, 100 U. S. 399, 25 L. Ed. 715.

The same view has been taken in *McCarthy v. Hinman*, 35 Conn. 538, *Nightingale, Ex parte*, 12 Fla. 272; *Schwartz, Ex parte*, 9 Tex. App. 381, following other Texas cases.

Contra: *Harris, In re*, 47 Mo. 64; *Fisher, Ex parte*, 6 Neb. 309.

But, in addition to the objections above stated, it may be here urged that it is essential to the stability of our system that a statute should only be pronounced unconstitutional when directly assailed either in the trial court, or by appeal or writ of error from that court.

Ruling in *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, has been already criticized in other relations. It may be noticed here that even were that ruling sustainable on other grounds it is open to the serious objection of leaving the sentences of courts having jurisdiction, entered after deliberate consideration and full trial, at the mercy of scratch hearings by single judges with habeas corpus jurisdiction.—Page, *Ex parte*, 49 Mo. 291, follows *People v. Liscomb*, though in Page, *Ex parte*, there would have been redress by writ of error or appeal. See 19 Cent. L. J. 102.

In *Yarbrough, Ex parte*, 110 U. S. 651, 28 L. Ed. 274, 4 Sup. Ct. Rep. 651, there is a marked withdrawal from the position taken in *Lange's Case*, and it is said by Miller, J., giving what appears to be the unanimous opinion of the court, that "this latter principle" (i. e., that of the right to review by the writ of habeas corpus void judgments by subordinate courts) "does not authorize the court to convert the writ of habeas corpus into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed here; for if that court had jurisdiction of the party and the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further.

"This principle disposes of the argument made before us on the insufficiency of the indictments under which the prisoners in this case were tried.

"Whether the indictment sets forth in comprehensive terms the offense which the statute describes and forbids, and for which it prescribes a punishment, is in every case a question of law which must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction.

"Its decision on the conformity of the indictment to the provisions of the statute may be erroneous, but if it is so it is an error of the law made by the court acting within its jurisdiction, which could be corrected on a writ of error, if such writ were allowed, but which can not be looked into on a writ of habeas corpus limited to

And in any view, where the object is to review the decision of a state court, the writ of habeas corpus will be refused when there can be a writ of error.²

an inquiry into the existence of jurisdiction on the part of that court.

"This principle is decided *Ex parte Tobias Watkins*, 28 U. S. (3 Pet.) 93, 7 L. Ed. 650, and *Parks, Ex parte*, 93 U. S. 18, 23 L. Ed. 787."

The objections to the Supreme Court of the United States hearing on habeas corpus non-jurisdictional errors are as follows:

(1.) If this revision can be assumed by the court in banc (as it has been in the more conspicuous cases above noticed), it can, at common law, be assumed by a single judge; and in this way a single judge, it may be in an inferior court, might review and overturn the action of the full bench of the highest court in the land. (2.) The writ does not bring up the whole record, from which the entire history and limitations of the case may be discovered. All that the return necessarily presents is the warrant or commitment by which the prisoner is held. (3.) The hearing is summary, and unrestrained by those logical limitations which attend bills of exception—limitations which, artificial as they may sometimes seem, are yet the products of a wise experience, and are best calculated in the long run to bring out the merits of a litigated issue. See, as maintaining this view, Judge Thompson's article, above cited, 4 *Crim. Law Mag.* 806. *Shaw, Ex parte*, 7 *Ohio St.* 87.

For the reasons given above,

Kearny, Ex parte, 55 *Cal.* 212, may be questioned. In that case it was held that the court hearing a writ of habeas corpus could release a prisoner convicted by a court of competent jurisdiction on the ground that the offense was not indictable. If this be good law, every judge who has jurisdiction to issue writs of habeas corpus becomes a court of error, by which not only all criminal convictions may be reviewed, but the question of what offenses are indictable is arbitrarily determined. That the ruling, however, of a court of competent jurisdiction that an offense tried before it is a crime can not be contested on a writ of habeas corpus is settled by a great preponderance of authority.—*Bird, Ex parte*, 19 *Cal.* 130; *Eaton, In re*, 27 *Mich.* 1; *Wilson, Ex parte*, 9 *Nev.* 71; *Parks, Ex parte*, 93 U. S. 18, 23 L. Ed. 787; *Callicot, In re*, 8 *Blatchf.* 89, *Fed. Cas. No.* 2323.

Ex parte Kearny, 55 *Cal.* 212, criticized above, has been followed in numerous cases in California, including *Greenall, Ex parte*, 153 *Cal.* 770, 96 *Pac.* 806, discharging prisoner on habeas corpus when complaint before justice did not state a crime. Also approved and followed in *Farrell, In re*, 36 *Mont.* 259, 92 *Pac.* 786, and *Rickey, Ex parte*, 31 *Nev.* 89, 135 *Am. St. Rep.* 651, 100 *Pac.* 136, discharging prisoner on habeas corpus when the information on which convicted did not state an offense.

² *Supra*, § 122.

§ 1944. **MILITARY JUDGMENTS CAN NOT BE THUS REVIEWED.** The action of a court-martial having jurisdiction will not be reviewed as such on a writ of habeas corpus;¹ nor will the proceedings of a court-martial, even when about to sit on a charge of desertion from a voidable enlistment, be overhauled by this writ;² nor will that of a military commission when imposed on a prisoner thereto amenable by law;³ nor that of a naval court-martial.⁴ But if a military court or court-martial be without jurisdiction, or with jurisdiction which has ceased, the petitioner will be released.⁵ The question of the relief of persons illegally enlisted is considered in another volume.⁶

§ 1945. — **NOR SUMMARY POLICE CONVICTIONS.** Summary convictions duly ordered by a justice of the peace will in like manner be respected. If he has statutory power so to convict, a court of errors will not review his decision, unless fraud or oppression be alleged.¹

Discharge by a district or circuit federal judge, on habeas corpus, it was at one time supposed that there could be no review by the Supreme Court of the United States (see note to *Brownahan*, *In re*, 18 Fed. 82); but now such an appeal can by statute be taken.—*Roberts v. Reilly*, 116 U. S. 80, 29 L. Ed. 544, 6 Sup. Ct. Rep. 291; *United States v. Jung Ah Lung*, 124 U. S. 621, 31 L. Ed. 591, 8 Sup. Ct. Rep. 663.

¹ *People ex rel. Underhill v. Fullerton*, 17 N. Y. Sup. Ct. (10 Hun) 63; *Com. v. Cornman*, 4 Serg. & R. (Pa.) 93; *Com. v. Gamble*, 11 Serg. & R. (Pa.) 93; *Reed, Ex parte*, 100 U. S. 12, 23, 25 L. Ed. 538; *Mason, Ex parte*, 105 U. S. 696, 26 L. Ed. 1213; *Keyes v. United States*, 109 U. S. 336, 27 L. Ed. 954, 3 Sup. Ct.

Rep. 202; *Coulter, In re*, 2 Sawy. 42, Fed. Cas. No. 3276; *White, In re*, 17 Fed. 723; *Opinions of Judge Advocates* 201.

² *State v. Seaton*, 61 Iowa 563, 16 N. W. 736; *McConologue's Case*, 107 Mass. 154; *Wall's Cases (Lowell, J.)*, 8 Fed. 85; *White, In re*, 17 Fed. 723.

³ See *Vallandigham, Ex parte*, 68 U. S. (1 Wall.) 243, 17 L. Ed. 589; *Vallandigham's Trial*, 258; 5 West. L. Month. 37.

⁴ *Bogart, In re*, 2 Sawy. 396, Fed. Cas. No. 1596.

⁵ *Barrett v. Hopkins*, 2 McC. 129, 7 Fed. 312.

⁶ 1 Kerr's Whart. Crim. Law, §§ 308, 309.

¹ Chancellor Kent, in refusing a writ in a case of summary conviction by a police magistrate, said: "It is not for me to ex-

§ 1946. — **NOR COMMITTALS FOR CONTEMPT.** A committal for contempt, by a court having authority, can not ordinarily be vacated by a writ of habeas corpus issued from another court.¹ This rule has been applied to commitments by federal courts for contempt when the writ was prayed for from a state court; and this independently of the question whether the federal court had jurisdiction of the principal case.² But where an inferior court transcends the statutory limits in a committal for contempt,—e. g., when the statute limits to thirty days, and the commitment is for an indefinite period,—or in other cases of transcending jurisdiction, there may be a reviewal by habeas corpus;³ and so where the commit-

amine into the legality or regularity of the conviction any further than to see that the magistrate had competent jurisdiction to convict and imprison in the given case. . . . I am only to exercise the power given me by the Habeas Corpus Act, and without that I should rather be inclined to think this court had no common law jurisdiction over the subject-matter. The conviction and imprisonment in this case are *prima facie*, good and valid in law, and that is sufficient upon this collateral inquiry. They must be held valid, until quashed or reversed in the regular course of appeal, by the appropriate tribunal."—*Matter of Goodhue*, 1 City Hall Rec. 153.

As to apprehension for vagrancy, see, *supra*, § 121, also §§ 1253, 1255.

¹ *Supra*, § 1921. CAL.—Cohn, *Ex parte*, 55 Cal. 193; Cottrell, *Ex parte*, 59 Cal. 420. IOWA.—Rob v. McDonald, 29 Iowa 330, 4 Am. Rep. 211. NEV.—Phillips v. Welch, 12 Nev. 158. N. H.—State v. Towle, 42 N. H. 540. N. Y.—People v.

Cassels, 5 Hill 164; Kearney's Case, 13 Abb. Pr. 459. WIS.—Perry, *In re*, 30 Wis. 268. FED.—Kearney, *Ex parte*, 20 U. S. (7 Wheat.) 38, 5 L. Ed. 391. ENG.—Clark, *Ex parte*, 2 Ad. & E. N. S. (2 Q. B.) 619, 42 Eng. C. L. 335; Cobbett, *In re*, 7 Ad. & E. N. S. (7 Q. B.) 187, 53 Eng. C. L. 185; Carus Wilson, *In re*, 7 Ad. & E. N. S. (7 Q. B.) 984, 53 Eng. C. L. 983; Crawford, *In re*, 13 Ad. & E. N. S. (13 Q. B.) 613, 66 Eng. C. L. 612; Andrews, *Ex parte*, 4 C. B. 226.

Nor will the writ lie to discharge a person from imprisonment for non-payment of fine for refusing to testify.—Smith, *Ex parte*, 117 Ill. 63, 7 N. C. 683.

² *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374; *Williamson v. Lewis*, 39 Pa. St. 9.

See, also, 4 Crim. Law Mag. 802.

³ LA.—State v. Sauvinet, 24 La. Ann. 119, 13 Am. Rep. 115. N. Y.—Shank's Case, 15 Abb. Pr. N. S. 38. TEX.—Holman v. Mayor, 34 Tex. 668. FED.—Fisk, *Ex parte*, 113 U. S. 713, 29 L. Ed. 1117, 5

ment is on its face defective.⁴ And a federal court may review a state commitment for contempt when clashing with a federal duty.⁵

§ 1947. COURT DETERMINES QUESTION OF FACT. The ordinary mode of instituting a prosecution, as we have seen, is an oath by the party injured, or by a competent third party in any way cognizant of the facts, before a magistrate or justice of the peace having jurisdiction. The party charged is then arrested and brought before the magistrate, by whom, after the case is heard, the defendant, if the evidence in the magistrate's opinion shows probable cause, is held to answer to the court having local jurisdiction to try the offense.¹ The defendant is then in custody; i. e., either in the custody of the officers of the law conducting him to prison, or of the keeper of the prison, or of his own bail. A writ of habeas corpus may then be sued out by the defendant addressed to the person by whom he is detained, and he is then brought by this person before the court issuing the writ. Supposing the object be, as is assumed in the present section, to determine whether there is sufficient proof to hold the defendant for trial, the court issuing the writ then proceeds to hear the evidence adduced by the prosecution. The case, for this purpose, begins de novo. The prosecution is not limited to the evidence produced before the committing magistrate. New documentary proof may be adduced; new witnesses may be called; new specifications of guilt

Sup. Ct. Rep. 724; *Ayers*, In re, 123 U. S. 443, 31 L. Ed. 216, 8 Sup. Ct. Rep. 164.

⁴ *Dudley v. McCord*, 65 Iowa 671, 22 N. W. 920; *Dill*, Ex parte, 32 Kan. 668, 49 Am. Rep. 505, 5 Pac. 39; *People v. Conner*, 15 Abb. Pr. N. S. (N. Y.) 430; *Electoral College*, In re, 1 Hughes 571, Fed. Cas. No. 4336, cited supra, § 1926.

See, also, cases cited supra, § 1926.

In *Grady v. Superior Court*, 64 Cal. 155, 30 Pac. 613, it was held that after discharge by a second court, the court committing could not re-imprison.

⁵ Supra, § 1926.

¹ See, supra, §§ 32 et seq.

As to practice, see *Church on Habeas Corpus*, §§ 177 ff.

introduced. The question before the court, on such writ, is not whether the magistrate acted with technical exactness, but whether the evidence, as presented to the court, shows that the defendant should be required to answer before a court and jury to a charge of a criminal offense. If this be the case, the defendant will be remanded to custody to answer such charge. It has been sometimes suggested that if there be a conflict of testimony, the court, on hearing the writ, should call a jury to its aid; and such has been the practice under some statutes.² But the usual course is for the court to act on the facts presented in the same way as would a committing magistrate hearing the case *de novo*. If the facts on the hearing exhibit a *prima facie* case of guilt of any offense of which the court has cognizance, the defendant should be remanded, but otherwise not.³ And it is proper that the court should call for all the facts requisite for a due understanding of the issue.⁴

The question of the prisoner's identity with that of the party named in the writ is always open.⁵

§ 1948. PROBABLE CAUSE ENOUGH. When, as has been just said, the question is whether the defendant should be bound over to trial, it is enough that probable cause should be made out against him. That this is the test in hearings before committing magistrates,¹ and in investigations before grand juries,² we have already seen; and it would be anomalous to require a higher degree of proof on hearing on habeas corpus. The object of the writ, in fact, in most cases falling within the category now before

² See *Graham v. Graham*, 1 Serg. & R. (Pa.) 331.

Contra: *Baker v. Gordon*, 23 Ind. 20.

³ *Infra*, § 1948; *supra*, §§ 112, 1289; *R. v. Carden*, L. R. 5 Q. B. Div. 1, 1 Crim. Law Mag. 197.

⁴ *Ibid.*; *supra*, § 1500.

⁵ *United States v. Jung Ah Lung*, 124 U. S. 621, 31 L. Ed. 591, 8 Sup. Ct. Rep. 663; *Leary*, *In re*, 10 Ben. 197, Fed. Cas. No. 8162.

¹ *Supra*, § 112.

² *Supra*, § 1289. See *Church on Habeas Corpus*, §§ 179 et seq.

us, is to determine whether the case is one which should go before a grand jury; and the test, therefore, to be applied is whether the grand jury, on the evidence before the court, ought to find the bill. If there is probable cause in the evidence before the court, that the defendant has committed an indictable offense, then he should be remanded to answer such offense.³

§ 1949. EVIDENCE NOT EXCLUDED ON TECHNICAL GROUNDS. When the question of probable cause is thus brought before the court, it is not bound to apply to evidence the strict exclusionary rules applied in trials before juries. The proceedings are provisional; the prosecution at least is compelled to present its case on very brief notice; probability is the test; it is enough if there is probable proof, though still stronger proof may be attainable, if the latter is not fraudulently withheld; and, in addition, the analogy of chancery practice, in which all testimony is offered to the court for inspection, irrespective of technical objection may be invoked.¹

§ 1950. REMITTING EVIDENCE AND RECORD BY CERTIORARI. A justice of the peace or other committing magistrate is required in England to take the depositions of witnesses examined before him in criminal prosecutions, and to forward these depositions to the court to whom the case is returned. In New York, and other states, the same practice is prescribed. The writ of habeas corpus does not by

³ Burr's Case, 1 Burr's Trial 11; Com. v. Carlisle, Bright. (Pa.) 36; Com. v. Megary, 8 Phila. (Pa.) 607; United States v. Johns, 4 U. S. (4 Dall.) 413, 1 L. Ed. 889; Benson v. McMahon, 127 U. S. 457, 32 L. Ed. 234, 8 Sup. Ct. Rep. 1240.

Compare: Balcom, In re, 12 Neb. 316, 11 N. W. 312.

Federal court will not review the decision of a commissioner on questions of fact.—Byron, In re, Crim. Proc.—150

18 Fed. 722. See Gerdemann v. Com., 11 Phila. 374.

¹ State v. Lyon, 1 N. J. L. (Coxe) 403; Heywood, In re, 1 Sandf. (N. Y.) 701; Benson v. McMahon, 127 U. S. 457, 32 L. Ed. 234, 8 Sup. Ct. Rep. 1240.

Waiver of preliminary examination does not preclude the defendant from showing want of probable cause.—See Cowell v. Patterson, 49 Iowa 514.

itself require the return of such depositions, and consequently in order to obtain them, the court issuing the writ of habeas corpus issues at the same time a writ of certiorari to the magistrate, so as to obtain possession of all his proceedings. In England the practice of the court on habeas corpus is to read these proceedings as part of the case.¹ In most jurisdictions in the United States the case is heard de novo on the testimony produced by the prosecution. In several jurisdictions the writ of certiorari is used as auxiliary to the writ of habeas corpus when the object is to obtain possession of the entire record.²

§ 1951. **AFFIDAVITS MAY BE RECEIVED.** In the English courts the practice has been to receive affidavits as part of the case both of relator and respondent.¹ In this country affidavits have also been received,² though not when secondary to other proof that might without great inconvenience be obtained.³

§ 1952. **NO DISCHARGE FOR TECHNICAL DEFECTS OR VARIANCE.** For merely formal defects, or misstatements of offense, a revisory court will not discharge on habeas corpus.¹ It will permit, as we have seen, the return to be

¹ Bac. Abr. Certiorari, A; Hurd's Habeas Corpus, b. II, ch. vi, § 5; Van Boven's Case, 9 Ad. & E. N. S. (9 Q. B.) 676.

² Supra, §§ 1702, 1926; Snell, In re, 31 Minn. 110, 16 N. W. 692.

³ Hurd's Habeas Corpus 307; R. v. Delaval, 3 Burr. 1434, 97 Eng. Repr. 913, 1 W. B. 412, 96 Eng. Repr. 234.

² 1 Burr's Trial, 97; State v. Lyon, 1 N. J. L. (Coxe) 403; People v. Chegaray, 18 Wend. (N. Y.) 637; Bollman, Ex parte, 4 Cr. 75, Fed. Cas. No. 2653.

³ Ibid. In Burr's Case, Marshall, C. J., said: "That a magistrate may commit upon affidavits has

been decided in the Supreme Court of the United States, though not without hesitation. The presence of the witnesses to be examined by the committing justice, confronted with the accused, is certainly to be desired; and ought to be obtained, unless considerable inconvenience and difficulty exist in procuring his attendance. An ex parte affidavit, shaped, perhaps, by the party pressing the prosecution, will always be viewed with some suspicion, and acted on with some caution; but the court thought it would be going too far to reject it altogether."

¹ People ex rel. Trainor v. Baker, 89 N. Y. 460.

amended; or it will, in the exercise of the powers belonging to justices of the peace, hold the relator over on the charge which the evidence develops.²

§ 1953. DISCHARGE FROM PARDON, OR STATUTE OF LIMITATIONS. The writ may be employed to effect the discharge of a person under sentence to whom a pardon has been addressed, if he is still restrained of his liberty,¹ or is relieved from imprisonment by operation of statutes of limitation.² In such case, however, it must appear that the state authorities were in default in not previously instituting the prosecution, or bringing the case to trial.³ Nor does the writ apply to a person out on bail.⁴

§ 1954. DISCHARGE FROM WANT OF PROBABLE CAUSE; ADJUSTMENT OF BAIL. Courts with oyer and terminer and quarter sessions jurisdiction have ordinarily the power of issuing writs of habeas corpus for the purpose of examining commitments by police magistrates; and if it appear that the commitment is without probable cause of discharging absolutely.¹ Such revisory courts, also, can readjust and reduce bail, or discharge on bail in cases in

² *Supra*, §§ 1936, 1937. CAL.—*Ring*, In re, 28 Cal. 247. DEL.—*State v. Buzine*, 4 Harr. 575. NEV.—*Ricard*, Ex parte, 11 Nev. 287. N. Y.—*Bank of United States v. Jenkins*, 18 Johns. 305; *People v. Nevins*, 1 Hill 154; *Taylor*, Ex parte, 5 Cow. 12. PA.—*Com. v. Crans*, 4 Pa. L. J. 459, 2 Clark 172; *Com. v. Hickey*, 2 Pars. 317; *Com. v. Hickey*, 1 Clark 436. FED.—*United States v. Johns*, 4 U. S. (4 Dall.) 413, 1 L. Ed. 889; *Bennett*, Ex parte, 2 Cr. 612, Fed. Cas. No. 1311; *Bollman*, Ex parte, 4 Cr. 75, Fed. Cas. No. 2653.

¹ *Edymoln*, In re, 8 How. Pr. (N. Y.) 478; *People v. Cavanaugh*, 2 Park. Cr. Rep. (N. Y.) 650;

Knapp v. Thomas, 39 Ohio St. 377, 48 Am. Rep. 462; *Territory v. Richardson*, 9 Okla. 579, 49 L. R. A. 440, 60 Pac. 244; *Greathouse's Case*, 2 Abb. (U. S.) 382, Fed. Cas. No. 5741. See *Callicot*, In re, 8 Blatchf. 89, Fed. Cas. No. 2323.

² *State v. Maurignos*, T. U. P. Charlton (Ga.) 24. See, *supra*, § 1379.

³ *Byrd v. State*, 2 Miss. (1 How.) 163; *Stanley*, Ex parte, 4 Nev. 113; *Clark v. Com.*, 29 Pa. St. 129; *Logan v. State*, 2 Brev. L. (S. C.) 415. See, *supra*, §§ 379, 1576.

⁴ *Logan v. State*, 1 Treadw. (S. C.) 493.

¹ See *Eagan*, Ex parte, 18 Fla. 194; *State ex rel. Distin v. Ensign*, 13 Neb. 250, 13 N. W. 216.

which discretion in this respect is not given to police magistrates. The local laws in this respect, as existing in different sections of the United States, it is not within our limits to detail. The practice as to bail has been already noticed. To justify a discharge in such cases the prosecution must be shown to be without probable cause.² As a general proposition, the writ lies to determine the grade of bail, in all cases in which the court applied to has supervisory jurisdiction of the offense.³ But there will be no discharge on bail when the evidence would sustain a capital conviction.⁴

Whether after an indictment found a writ will be granted to determine the amount of bail has been much discussed. It has been argued on the one side that the in-

² Troia, In re, 64 Cal. 152, 28 Pac. 231.

³ Supra, § 122. ALA.—Champion, Ex parte, 52 Ala. 311. FLA.—Finch v. State, 15 Fla. 633. MASS.—Jones v. Kelly, 17 Mass. 116; Whiting v. Putnam, 17 Mass. 175. MO.—Snowdon v. State, 8 Mo. 483. N. H.—State v. McNab, 20 N. H. 160. N. J.—State v. Rockafellow, 6 N. J. L. (1 Halst.) 332. N. Y.—People v. Cole, 6 Park. Cr. Rep. 695. PA.—Com. v. Ridgeway, 2 Ashm. 247. FED.—United States v. Hamilton, 3 U. S. (3 Dall.) 17, 1 L. Ed. 490. ENG.—Barronet, In re, 1 Ellis & B. 1, 72 Eng. C. L. 1, Dears. C. C. 51; R. v. Bartlemy, Dears. C. C. 60.

In Bridewell, Ex parte, 56 Miss. 39, affirmed in Wray, Ex parte, 30 Miss. 681, it was held that under a constitutional provision that "excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses where the proof is evident or the

presumption great," there is no prohibition against admitting to bail a defendant charged with a capital crime; but he may be so admitted to bail within the sound discretion of the trial judge. Where, in such case, it was further held, a well-founded doubt of guilt is entertained, the proof is not evident, nor the presumption great, and bail should be granted. In such cases the burden is on the relator to show that he is illegally deprived of his liberty, and all available evidence should be produced, even if the hearing should be adjourned.

Compare: Street's Case, 43 Miss. 1.

Burden is on relator.—See, farther, Duncan, Ex parte, 54 Cal. 75, cited infra; Miller v. State, 43 Tex. 579; Walker, Ex parte, 3 Tex. App. 668.

Compare points stated supra, §§ 117-122.

⁴ Troia, In re, 64 Cal. 152, 28 Pac. 231; Com. v. Keeper of Prison, 2 Ashm. (Pa.) 227.

dictment is conclusive as to the amount of bail.⁵ On the other hand, it is well replied that indictments are not conclusive as to grade of offenses, since the indictment is usually for the major offense, when the major includes a minor, while the guilt may be only that of the minor offense. If the offense is bailable, it is further argued, it is for the court to fix the bail at its discretion.⁶ The tests to be applied in the determination of the amount of bail have been already discussed.⁷

§ 1955. JUDGMENT MUST BE EITHER DISCHARGE OR REMANDER. The judgment must be either discharge or remander. A conditional judgment that an examining magistrate must either commit the prisoner at once, or fully discharge him, can not be sustained.¹

§ 1956. DURING HEARING CUSTODY IS IN COURT OF WRIT. The effect of the writ being to place the custody of the relator in the court issuing the writ, it is the duty of that court to see to his safe keeping. This is done by either remanding the relator to the keeper of the prison, if he were there confined, or placing him under the control of the sheriff or marshal of the court.¹

§ 1957. WRIT OF ERROR NOT PERMISSIBLE AT COMMON LAW; PROCEEDINGS IN ERROR. In England the action of the court on a writ of habeas corpus can not be revised on error;¹ and the same rule has been repeatedly sustained

⁵ Marshall, C. J., 1 Burr's Trial 310; *People v. Tindler*, 19 Cal. 539, 81 Am. Dec. 77; *People v. Dixon*, 4 Park. Cr. Rep. (N. Y.) 651; *United States v. Reese*, 3 Wash. 224, Fed. Cas. No. 15495.

⁶ ALA.—*Bryant, Ex parte*, 34 Ala. 270. ILL.—*Lynde v. People*, 38 Ill. 497. MISS.—*Street v. State*, 43 Miss. 1. N. H.—*State v. McNab*, 20 N. H. 160. N. Y.—*People v. Hyler*, 2 Park. Cr. Rep. 570. TEX.—*Drury v. State*, 25 Tex. 45.

See, also, *supra*, §§ 117-122.

⁷ *Supra*, §§ 117 et seq. See *Duncan, Ex parte*, 54 Cal. 75.

¹ *People v. Donahue*, 21 N. Y. Sup. Ct. 133.

¹ *Kaine, In re*, 55 U. S. (14 How.) 131, 14 L. Ed. 357; *R. v. Bethel*, 5 Mod. 22, 87 Eng. Repr. 494.

As to the question of general custody, see, *supra*, § 1825.

¹ 8 Co. R. 121 b; *Willson's Case*, 7 Ad. & El. 984; *R. v. Dean*, 8 Mod.

in this country.² But in cases where irremediable injury may be done by the action of the court below, such action partaking of the nature of a final judgment, there is authority to hold that error lies.³ And in most states appellate process is in such cases provided by statute;⁴ in others, the case may be taken up to an appellate court by certiorari.⁵ That some process of revision should be pro-

27, 88 Eng. Repr. 21, 2 Bro. P. C. 554.

² ALA.—Wade v. Judge, 5 Ala. 18. CAL.—Ring, In re, 28 Cal. 347. ILL.—Hammond v. People, 32 Ill. 446, 83 Am. Dec. 286; Thompson, Ex parte, 93 Ill. 89; People ex rel. Magee v. McAnally, 221 Ill. 66, 5 Ann. Cas. 590, 77 N. E. 544; Wallace v. Cleary, 5 Ill. App. 384; Napier v. People, 9 Ill. App. 523; People v. Skinner, 19 Ill. App. 332. IOWA.—Curley, In re, 34 Iowa 184; Fouts v. Pierce, 64 Iowa 71, 19 N. W. 854. LA.—Mitchell, Ex parte, 1 La. Ann. 313. MD.—Bell v. State, 4 Gill. 304. MASS.—Wyeth v. Richardson, 76 Mass. (10 Gray) 240. MICH.—People v. Fairman, 59 Mich. 568, 26 N. W. 769. MISS.—Howe v. State, 9 Miss. (1 Smed. & M.) 690. MO.—Jillz, Ex parte, 64 Mo. 205, 27 Am. Rep. 218; McDonald, In re, 19 Mo. App. 370; State ex rel. Hiett v. Simmons, 112 Mo. App. 535, 87 S. W. 35. N. Y.—Yates v. People, 6 Johns. 429, though see contra Yates v. People, 6 Johns. 337; People ex rel. Young v. Stout, 10 Misc. 247, 31 N. Y. Supp. 421. N. D.—Carruth v. Taylor, 8 N. D. 166, 77 N. W. 617. PA.—Russell v. Com., 4 Pen. & W. 82; Com. v. Kryder, 1 Pa. St. 143; Clark v. Com., 29 Pa. St. 129. TEX.—Coopwood, Ex parte, 44 Tex. 467. UTAH.—Clasby, In re, 3 Utah 183, 1 Pac. 852. WIS.

—State ex rel. McCaslin v. Smith, 65 Wis. 93, 26 N. W. 258.

As to appealability of decisions in habeas corpus proceedings, see note 45 Am. Dec. 133.

³ See Knowlton v. Baker, 72 Me. 200; Lafonta, Ex parte, 2 Rob. (La.) 495; Holmes v. Jennison, 39 U. S. (14 Pet.) 540, 10 L. Ed. 579; Wells, Ex parte, 59 U. S. (18 How.) 307, 15 L. Ed. 421; Robinson, Ex parte, 6 McL. 355, Fed. Cas. No. 11935.

In Thompson, Ex parte, 96 Ill. 158, where it was held that a writ of error does not lie in Illinois to review a judgment on a writ of habeas corpus.

⁴ Cleveland, Ex parte, 36 Ala. 306; Macready v. Wilcox, 33 Conn. 321; State v. Kirkpatrick, 54 Iowa 373; Roth v. House of Refuge, 31 Md. 329; Rothschild, Ex parte, 2 Tex. App. 566.

As to practice in error, see People v. Hessing, 28 Ill. 410.

As to the Michigan practice, see Corrie v. Corrie, 42 Mich. 509, 4 N. W. 213.

The rule in respect to the federal courts has been elsewhere discussed.—Supra, § 95.

⁵ Hurd Hab. Corp. 326; Lafonta, Ex parte, 2 Rob. (La.) 495; McLeod's Case, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; Com. v. Biddle, 6 Penn. L. J. 287, 4 Clark (Pa.) 35;

vided is essential. Otherwise a single judge, by writs of habeas corpus, could not only discharge every prisoner in the state, but prevent the service of any judicial process requiring attachment of the person. Under our peculiar federal system, the judgments of state courts on habeas corpus, can, when conflicting with the federal constitution, be the subject of a writ of error to the Supreme Court of the United States.⁶

By the Act of March 3, 1885, an appeal was given from a final decision in habeas corpus of a circuit court to the Supreme Court of the United States; but this decision must be by the court and not by the judge sitting as a judge.⁷ That a refusal by a district judge to issue a writ is ground for an appeal to the Supreme Court of the United States.⁸ And a rightful discharge by a circuit judge will be sustained on appeal.⁹

§ 1958. **HOW FAR DISCHARGE AFFECTS SUBSEQUENT APPREHENSION.** When a court of competent jurisdiction has refused to discharge on habeas corpus, a court with concurrent jurisdiction may decline to issue a writ on the same case, unless there be an allegation of new facts.¹ It has also been held that if, after a discharge by one judge, the relator should be reapprehended, he should be discharged when brought before another judge with co-ordi-

Crow, *In re*, 60 Wis. 349, 19 N. W. 713, where the cases are examined in detail.

⁶ *Tarble's Case*, 80 U. S. (13 Wall.) 397, 20 L. Ed. 597. See comments in § 1943.

⁷ *Carper v. Fitzgerald*, 121 U. S. 87, 30 L. Ed. 882, 7 Sup. Ct. Rep. 825; *United States v. Jung Ah Lung*, 124 U. S. 621, 31 L. Ed. 591, 8 Sup. Ct. Rep. 663; *supra*, § 1943.

⁸ See *Snow, In re*, 120 U. S. 274, 30 L. Ed. 658, 7 Sup. Ct. Rep. 556; *supra*, § 1939.

⁹ *Wildenhuss's Case*, 120 U. S. 1, 30 L. Ed. 565, 7 Sup. Ct. Rep. 383.

As to rulings prior to act of 1885, see *Hung Hang, Ex parte*, 108 U. S. 552, 27 L. Ed. 811, 2 Sup. Ct. Rep. 863; *Tom Tong, Ex parte*, 108 U. S. 556, 27 L. Ed. 826, 2 Sup. Ct. Rep. 871; *Brosnahan, In re*, 4 McC. 1, 18 Fed. 62.

¹ *Lawrence, Ex parte*, 5 Binn. (Pa.) 304; *Com. v. Wetherold*, 2 Clark (Pa.) 476; *Miller v. State*, 43 Tex. 579.

As to Georgia practice, see *Perry v. McLendon*, 62 Ga. 598.

nate powers.² But a discharge on a writ of habeas corpus (when the question is whether there is probable cause to hold over for trial) is no bar, in law, to subsequent proceedings for the same offense.³ As a matter of courtesy or convenience, a judge may say, "This case has been heard already by a co-ordinate judge, who has remanded or discharged the relator, and I will not go over the same ground."⁴ But should a grand jury find a bill in such case, or an information, if an information be proper, be presented, the discharge would be no bar. To constitute such a bar there must be a formal acquittal or conviction of a court having jurisdiction.⁵

A more difficult question, however, arises in cases where the discharge is for error in sentence, and when the court imposing the sentence reapprehends. It has been maintained by a majority of the Supreme Court of Wisconsin that such second arrest is irregular and invalid.⁶ But great practical difficulties are in the way of the maintenance of this rule. After a conviction had been sustained by the Supreme Court of a state, the defendant could be discharged on habeas corpus by a single judge without, on such a theory, the opportunity of revision or re-apprehension; and the same confusion would arise in case one judge should undertake to discharge persons committed by another judge for contempt.⁷ The only way of escaping such difficulties is by giving a writ of error in habeas

² Ibid.; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *Da Costa, In re*, 1 Park. Cr. Rep. (N. Y.) 129; *Com. v. McBride*, 2 Brewst. (Pa.) 545.

³ *Walker v. Martin*, 43 Ill. 508; *Mitchell, Ex parte*, 1 La. Ann. 413; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *Eldridge v. Fancher*, 3 Thomp. & C. (N. Y.) 189; *People v. Fancher*, 1 Hun (N. Y.) 27.

Contra, under Missouri statute. —*Jilz, Ex parte*, 64 Mo. 205, 27

Am. Rep. 218, where it was held that *autrefois acquit* could be pleaded in such cases.

⁴ *Kittrell, Ex parte*, 20 Ark. 499; *Alexander, Ex parte*, 14 Fed. 680.

⁵ *Supra*, §§ 1366 et seq.

⁶ *Crow, In re*, 60 Wis. 349, 19 N. W. 713.

⁷ *Grandy v. Superior Court*, 64 Cal. 155, 30 Pac. 613; *supra*, § 1141.

See, also, argument in note to *supra* § 1943.

corpus to the Supreme Court of the state, just as in cases of habeas corpus, conflicting with the federal constitution, there is a writ of error to the Supreme Court of the United States.

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